A NEW DIRECTION

ADVANCING ABORIGINAL AND TREATY RIGHTS

/// BY DOUGLAS R. EYFORD

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The opinions and views outlined in this independent report are those of Mr. Douglas Eyford, the Ministerial Special Representative on Reviewing the Comprehensive Land Claims Policy. They are not necessarily the opinions or views of the Government of Canada.

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Letter to the Hon. Bernard Valcourt

20 February 2015

Dear Minister:

RE: Renewing Canada's Comprehensive Land Claims Policy

Enclosed for delivery is my report, *A New Direction: Advancing Aboriginal and Treaty Rights*.

Canada has addressed Aboriginal land claims through a formal comprehensive land claims policy since 1973. There have been far-reaching changes in Canadian Aboriginal law since that policy was last updated in 1993. There is a great deal of interest across Canada in your initiative to renew the comprehensive land claims policy as part of a new framework to address Aboriginal and treaty rights.

This report addresses the elements of my mandate. It identifies and discusses the issues raised at engagement meetings by representatives of Aboriginal communities and organizations, provincial and territorial governments, and stakeholders about Canada's interim comprehensive land claims policy.

I have also provided a series of recommendations which I trust will be of value in your deliberations about next steps.

My role as Ministerial Special Representative has now come to an end. Thank you for the opportunity to contribute to this important initiative.

Yours truly,

Douglas R. Eyford

Douglas R. Eyford

Executive Summary

Treaty-making has been a dominant feature of Crown-Aboriginal relations since the 18th century. The earliest treaties in present day Canada were simple agreements designed to secure military alliances, promote peace, and facilitate trade. As the country expanded west and north, treaties were completed to clear title to the land for settlement and development. Canada's efforts to conclude treaties ended in 1921 without treaties being completed in parts of Quebec, Labrador, Ontario, the north, and most of British Columbia.

Canada re-established a policy of treaty-making in 1973 in response to persisting claims of unextinguished Aboriginal rights to land. Comprehensive land claims agreements are the modern equivalent of historic treaties. They are designed to provide certainty and predictability over land and resources. Modern treaties, where completed, have improved socio-economic outcomes for Aboriginal beneficiaries.

It is discouraging, however, that only 26 agreements have been finalized in 42 years given the expenditure of time and resources on negotiations. From the outset, the comprehensive land claims process has been undermined by institutional barriers and process inefficiencies. Today, 75 claims are at various stages of negotiation. More than 80 per cent of those tables have been in the treaty process for longer than ten years, some for more than two decades.

It is costly to maintain negotiations that drag on year-after-year. Aboriginal participation is funded through a combination of loans and non-repayable contributions. Since 1973, Canada has advanced in excess of $1 billion to Aboriginal groups through loans and contributions. The debt burden has become an unsustainable barrier to progress.

There is a conspicuous lack of urgency in negotiations and in many cases there are sharp differences between the parties about the core elements of a modern treaty. A plan needs to be developed to bring negotiations to a close. All parties must be ready to confront hard realities. Not all claims appear to be heading to successful conclusions.

Efforts to negotiate comprehensive land claims have occurred during a period of sweeping legal changes. In 1982, Aboriginal and treaty rights were recognized and affirmed in the Canadian Constitution. Since then, litigation has dominated Crown-Aboriginal relations and a series of judicial decisions has imposed high standards on the Crown in its dealings with Aboriginal people. It has been challenging for public policy to keep pace with the evolving legal landscape.

In July 2014, the Hon. Bernard Valcourt asked me to lead Canada's engagement with Aboriginal groups and key stakeholders as a first step towards the renewal of Canada's comprehensive land claims policy. My appointment coincided with the release of an interim policy, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. The interim policy outlines Canada's approach to developing a new framework to address Aboriginal and treaty rights and was intended as a starting point for my engagement with Aboriginal groups and others.

Engagement meetings took place over a period of several months in eight provinces and two territories. The meetings were attended by representatives from over 100 Aboriginal communities, as well as Aboriginal organizations, provincial, territorial, and municipal governments, and other stakeholders. The meetings provided a constructive exchange of views about the comprehensive land claims process, as well as more general discussions about Canada's relationship with Aboriginal Canadians.

The renewal of the comprehensive land claims policy is timely. As the interim policy notes, Aboriginal people represent the fastest-growing segment of the Canadian population, with close to 50 per cent of the Aboriginal population under age 25. The interim policy links these demographics to opportunities for economic growth, prosperity, and job creation. It acknowledges a series of principles to recognize and reconcile Aboriginal rights and proposes that recognition and reconciliation be pursued through agreements and arrangements in addition to comprehensive modern treaties.

The interim policy is a constructive starting point. Canada's commitment to reconciliation should be reflected in a new framework that:

- continues to support modern treaty negotiations but addresses the institutional barriers and process inefficiencies that are obstructing progress at treaty tables;
- provides a rights-informed approach to treaty-making for Aboriginal groups that want to proceed on that basis;
- offers other reconciliation arrangements for Aboriginal groups that are not interested in negotiating a comprehensive land claims agreement; and
- improves the implementation of modern treaties and other agreements with Aboriginal groups.

A national policy that attempts to address the divergent interests of all Aboriginal groups the same way is bound to produce limited results. Canada's approach must be capable of responding to the varied historic, cultural, and socio-economic interests of Aboriginal communities. Because reconciliation is an ongoing process, it will also be important for Canada's approach to adapt to new developments and changing circumstances.

Facts at a Glance

ENGAGEMENT MEETINGS

Engagement meetings took place between August 2014 and February 2015 in eight provinces and two territories.

104 Aboriginal groups, eleven Aboriginal organizations, eight provincial and territorial governments, 16 stakeholders, and several federal departments and agencies participated.

HISTORIC TREATIES

The earliest recognized treaty in present day Canada is the treaty of Albany concluded between France and the Iroquois confederacy in the Great Lakes region in 1701.

The Royal Proclamation was issued in 1763.

Approximately 70 recognized treaties were completed between the 18th century and 1921.

THE COMPREHENSIVE LAND CLAIMS POLICY

The first comprehensive land claims policy was published in 1973. The policy was updated in 1981, 1986, and 1993.

Negotiations under the BC treaty process were initiated in 1993.

MODERN TREATIES

Since 1973, 122 comprehensive land claims have been accepted for negotiation.

Twenty-six modern treaties have been completed in three provinces and three territories.

Currently, 75 claims are at different stages of negotiation: 14 negotiation tables outside BC, 53 negotiation tables in BC, and eight transboundary land claim negotiations.

COST OF NEGOTIATIONS

Since 2005, AANDC's annual expenditures to participate in comprehensive land claims and self-government negotiations have averaged $22.9 million.

As of January 2013, Canada advanced more than $1 billion to Aboriginal groups to fund their participation in negotiations through a combination of loans and non-repayable contributions.

Approximately $70 million in loans are in the process of being repaid. The negotiation loans of 15 modern treaty groups have been repaid in full.

BC First Nations have accumulated negotiation loan debt of approximately $500 million.

DELAYS

It can take up to 30 years to conclude a comprehensive land claims agreement. The average negotiating time is 15 years.

It took 15 years to complete the first treaty under the BC treaty process. Four treaties have now been completed.

LEGAL DEVELOPMENTS AND LITIGATION

Section 35 was enacted as part of the *Constitution Act, 1982*.

In *Calder* (1973), the Supreme Court of Canada acknowledged the existence of Aboriginal title but could not agree if it applied in BC.

In *Sparrow* (1990), the Court confirmed the Constitutional priority of Aboriginal rights and established the test the Crown must meet to justifiably infringe Aboriginal rights.

In *Delgamuukw* (1997), the Court confirmed that Aboriginal title continued to exist in BC and that it is right to the land itself.

In *Haida Nation* (2004), the Court confirmed that the Crown must consult and, where appropriate, accommodate claimed or proven Aboriginal rights where Crown action may adversely affect those rights.

In *Little Salmon/Carmacks* (2010), the Court held that a duty to consult exists in respect of modern treaty rights.

In *Manitoba Métis Federation Inc.* (2013), the Court held that the honour of the Crown requires the Crown to diligently fulfill the implementation of constitutional obligations to Aboriginal people.

In *Tsilhqot'in* (2014), the Court declared, for the first time, that a specific group has Aboriginal title to Crown land.

SECTION 1 — Introduction

SECTION 1 — Introduction

Throughout present-day Canada, the Crown entered into treaties with Aboriginal peoples[1] who surrendered their claims to land in return for reserves and other consideration. This did not happen, however, in most of British Columbia, the northern territories, and in parts of Ontario, Quebec, and Labrador. Since 1973, Canada has endeavoured to conclude treaties with Aboriginal groups in those regions and has done so under a national comprehensive land claims policy.

> The term "comprehensive land claim" was coined in the 1970s to describe the broad and exhaustive approach to modern treaties that encompass, among other matters, the ownership of lands, self-government, fish and wildlife harvesting rights, participation in land and resource management, financial arrangements, capital transfer, and resource revenue sharing.

In July 2014, the Hon. Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development ("AANDC"), asked me to engage with Aboriginal groups, territorial and provincial governments, and key stakeholders about the renewal and reform of Canada's comprehensive land claims policy. My appointment coincided with the publication by Canada of its interim policy on comprehensive land claims entitled *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (the "Interim Policy").[2] The Interim Policy was intended to provide a high-level starting point for my engagement meetings.

The Interim Policy identifies ten reconciliation principles designed to guide and inform Canada's relationship with Aboriginal Canadians and describes in general terms the objectives and scope of negotiations for modern treaties, self-government agreements, and non-treaty agreements. The Interim Policy expressly states that it is not intended to be comprehensive in nature, exclusive of other potential subjects, or representative of a final policy document. Moreover, it invites interested parties to provide their views to help finalize Canada's approach to comprehensive land claims.

1 The term "Aboriginal" is used throughout this report to denote First Nations, Inuit, and Métis peoples of Canada. "Crown" refers to the government of Canada, the government of a province or territory, or a combination. Unless otherwise intended by context, "Canada" means the government of Canada.

2 Minister of Aboriginal Affairs and Northern Development, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: Public Works and Government Services Canada, 2014) [Interim Policy]. The Interim Policy is available at: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf.

Some Aboriginal organizations were critical of Canada's initiative. The BC Assembly of First Nations described the Interim Policy as an affront, because the national Assembly of First Nations had jointly developed the ten principles reflected in the Interim Policy, but was not informed of Canada's plan to renew and reform the Interim Policy. Even with the inclusion of the reconciliation principles, others complained the Interim Policy was nothing more than a reiteration of previous policies. The Union of BC Indian Chiefs passed a resolution rejecting the Interim Policy and demanding the government jointly draft a new comprehensive land claims policy with First Nations that would provide a framework for recognizing Aboriginal rights and title.[3] The First Nations Summit asserted that Canada "unilaterally developed" the Interim Policy and this was unacceptable.[4] Idle No More encouraged Aboriginal groups to boycott engagement meetings.[5] There was also confusion whether the meetings constituted official Crown consultation (they did not).

This reaction reflects ongoing tensions between the Crown and Aboriginal organizations. Crown-Aboriginal relations are frequently adversarial, the underlying problems complex, and progress elusive. Aboriginal organizations are often distrustful of and sceptical about Crown initiatives that are intended to address Aboriginal and treaty rights.[6]

Far-reaching changes in Canadian Aboriginal law during the past 25 years have further complicated Crown-Aboriginal relations. Courts have identified a range of constitutionally protected Aboriginal and treaty rights and have imposed high standards on the Crown in its dealings with Aboriginal people.

In June 2014, the Supreme Court of Canada issued its historic declaration that the Tsilhqot'in Nation holds Aboriginal title to Crown land in British Columbia.[7] The decision has been celebrated by Aboriginal groups across Canada and has elevated expectations about Aboriginal participation in land and resource development. As discussed in section 3, contemporary legal developments have significant implications for the negotiation and implementation of modern treaties.

3 See http://www.ubcic.bc.ca/files/Combined_FINAL_UBCICSubmissiontoEyford.pdf.
4 See the First Nations Summit Resolution #1014.13.
5 See http://www.idlenomore.ca/turn_the_tables.
6 Historically, policy and legislation affecting Aboriginal interests were developed largely without Aboriginal consent or participation (see John F. Leslie, "The *Indian Act*: An Historical Perspective" (2002) Canadian Parliamentary Review, vol. 25 no. 2).
7 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

The opposition by some to the Interim Policy did not discourage Aboriginal representatives from attending engagement meetings and participating in a frank and constructive exchange of views. Overwhelmingly, Aboriginal groups confirmed they want a relationship with Canada that recognizes their Aboriginal and treaty rights.

The engagement meetings took place between August 2014 and February 2015. A list of participants is identified in Appendix A.

The format for the engagement meetings varied from region to region. There are 198 *Indian Act* bands resident in British Columbia with approximately half involved in modern treaty-making.[8] Regional meetings were convened in Prince George, Nanaimo, Terrace, Kamloops, and Vancouver to accommodate the large number of Aboriginal communities both in and outside the BC treaty process. Similarly, I met collectively in Whitehorse with representatives of the 11 Yukon First Nations who negotiated land claim and self-government agreements with Canada. I also participated in meetings with Aboriginal groups in Edmonton, Yellowknife, Winnipeg, Ottawa, Montreal, Quebec City, Sept-Iles, Moncton, Halifax, and St. John's. In addition to the exchange of information at engagement meetings, I received written submissions from several sources canvassing a variety of topics.

The engagement meetings and written submissions highlight the diversity in Canada's Aboriginal population and the significant historic, cultural, and socio-economic distinctions between and within regions. It is challenging, if not impossible, to effectively address Aboriginal interests in a national policy that does not acknowledge and accommodate regional differences.

Although there is not a consistent Aboriginal perspective on all issues, there is a general consensus that Canada is inflexible in its approach to Aboriginal interests and endeavours to meet its minimum legal obligations, nothing more. Canada is seen as unresponsive to Aboriginal interests and rigid in its application of the comprehensive land claims policy. There is also a widely held view that federal policies lag behind legal developments.

There is general support for the comprehensive land claims process among Aboriginal groups pursuing modern treaties. Empirical and anecdotal information demonstrate that modern treaties promote improved socio-economic outcomes in Aboriginal communities. The modern treaty process has not, however, delivered anticipated returns. Treaty-making has progressed at a glacial pace and at significant cost. There is a pressing need for all parties to acknowledge the systemic obstacles.

Some Aboriginal groups are of the view that a comprehensive land claim will not meet their interests. Therefore, Canada also needs to pursue other forms of arrangements as contemplated by the Interim Policy in order to advance reconciliation with those communities.

8 There are another five bands that have transboundary claims in the province.

Provincial and territorial governments in British Columbia, Ontario, Quebec, Newfoundland and Labrador, Yukon, and the Northwest Territories are also participants in modern treaty negotiations. Representatives of those governments provided useful perspectives about how the comprehensive land claims process could be made more efficient and responsive.

Canada is participating in negotiations with Aboriginal groups in Nova Scotia, New Brunswick, Quebec, and Prince Edward Island who are seeking to modernize their historic peace and friendship treaties. Aboriginal groups and provincial officials in those provinces expressed frustration about Canada's limited negotiation mandates. Similarly, the comprehensive land claims process does not address the interests of Métis people. I had an opportunity to meet with representatives of the Métis National Council, the Métis Nation of Ontario, and the Manitoba Métis Federation. Section 4-B includes my recommendations in relation to Métis groups.

Provincial representatives across the country emphasized the need for the Crown to develop new incremental reconciliation tools to achieve better outcomes. Some provincial governments have already started to do this without involving Canada. For example, the government of British Columbia is implementing wide-ranging measures outside modern treaties to address Aboriginal interests in that province.

Industry organizations and companies involved in natural resource developments contributed their perspectives. Industry's views about the need for certainty in relation to project approval are included as part of the discussion in section 5-E.

This report is divided into six sections. Section 2 sets out a brief history of Canada's approach to negotiating treaties. Section 3 describes developments in the law that have influenced modern treaty-making and the Crown-Aboriginal relationship. Section 4 discusses the need for a new reconciliation framework that acknowledges the continued importance of modern treaty-making but also the need for other reconciliation arrangements and an alternative, rights-informed approach to treaty negotiations. Section 5 addresses the necessary reforms to improve the effectiveness of the modern treaty-making process.

Appendix C sets out a consolidated list of recommendations based on the following observations:

1. the inclusion of section 35 in the *Constitution Act, 1982* and subsequent judicial decisions have raised the expectations of Aboriginal groups about the recognition and exercise of their Aboriginal and treaty rights;

2. economic and resource development projects will not proceed unless Aboriginal and treaty rights are taken into account. That is the law;

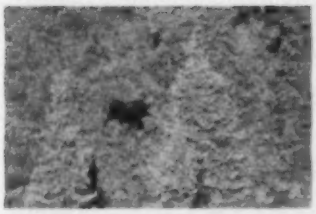
3. the parties frequently rely on litigation to resolve disputes about Aboriginal and treaty rights. As a result, the judiciary has been largely responsible for policy development in this area. Legal proceedings are not an effective dispute resolution tool. The parties need to develop alternate strategies to address Aboriginal claims when they arise;

4. the comprehensive land claims policy has limited reach — it does not address the interests of Aboriginal groups not pursuing modern treaties, the Métis, or the beneficiaries of historic treaties;

5. strategic agreements and other reconciliation arrangements can provide an effective and immediate way for Canada to address Aboriginal interests while at the same time facilitating economic and resource development;

6. modern treaties are complex agreements that have taken longer to negotiate than anticipated and at significant cost. While 26 modern treaties have been completed since 1973, another 75 tables are at various stages of negotiation. Institutional barriers, process inefficiencies, poor accountability, and a lack of urgency have contributed to these disappointing results; and

7. there have been shortcomings in Canada's efforts to implement modern treaties. Higher level oversight is required to ensure all federal departments meet their implementation obligations.



SECTION 2 — Treaty-Making in Canada

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Canada's earliest treaties pre-date Confederation and resulted from the political and military turmoil between France and Great Britain. These historic "peace and friendship" treaties were strategically designed to secure peace and promote trade. They were written in English by representatives of the Crown, were completed within a matter of days if not hours, reflected common law principles, and in many cases were no more than a few paragraphs in length. Many of these treaties were not translated into the written form of the language of the various First Nations signatories.

> The word "treaty" has an expansive meaning. Historical documents have been deemed treaties where they reflect "the word of the white man" *i.e.*, at the time the document was made, a formal agreement was the means to obtain the good will and cooperation of Aboriginals and ensure the health and safety of European settlers.
>
> See *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at 648–49, aff'd [1965] S.C.R. vi.

This is to be contrasted with modern treaties which are prolix and complex documents offering substantial benefits and intended to create certainty around property ownership, land and resource use, harvesting and gathering rights, and governance. Aboriginal communities negotiating these agreements have access to legal and other professional advisors funded through government loans and contributions. The recently completed Tla'amin Final Agreement, which took 20 years to negotiate and ratify, is a several hundred page document divided into 26 chapters addressing, among other things, ownership of treaty settlement lands, fiscal arrangements and capital transfer, rights of access to Crown land, rights to harvest fish and wildlife, self-governance, environmental assessments, resource revenue sharing, and tax matters.[9] Modern treaties have been described as representing a "quantum leap" beyond their historic counterparts.[10]

A. Canada's Role in Treaty-Making

Canada has a unique relationship with Aboriginal people. The Royal Proclamation represents an early expression of the Crown's intention to act honourably with respect to Aboriginal interests in land. The division of powers in the *Constitution Act, 1867* provides Canada with exclusive legislative authority over "Indians, and Lands reserved for the Indians".[11] There is also a special trust-like or fiduciary component to the Crown-Aboriginal relationship. This relationship is

9 See Tla'amin Final Agreement online at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/tla_1397237565325_eng.pdf.

10 *Beckman v. Little Salmon/Carmacks*, [2010] 3 S.C.R. 103, at para. 12 [*Little Salmon/Carmacks*].

11 Section 91(24) of the *Constitution Act, 1867*.

reflected in section 35 of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal people. The special nature of the relationship means that the honour of the Crown is at stake in all of Canada's dealings with Aboriginal people.[12]

Areas of provincial jurisdiction also affect Aboriginal and treaty rights. Provinces have exclusive jurisdiction over property and civil rights and are responsible for the exploration, development, and conservation of natural resources. Furthermore, provinces are the primary landowners. For example, in British Columbia, provincial Crown land makes up 94% of the province, whereas federal Crown land only one percent.[13]

Canada has discrete areas of jurisdiction within provinces, including responsibility for national parks, national defence, fisheries, migratory birds, and navigation and shipping. Canada also relies on its trade and commerce and federal undertaking powers to legislate in areas where activities are inter-provincial in nature or of sufficient scale to justify federal involvement.

B. Historic Treaty-Making

In 1763, King George III marked the end of the Seven Years' War by issuing the Royal Proclamation. Under the Treaty of Paris, France ceded control of its North American territories to Great Britain. The Royal Proclamation established a new administrative structure for British North America and acknowledged Aboriginal possession of lands that had not been ceded to or purchased by the Crown. The Royal Proclamation also prohibited the purchase or sale of Aboriginal lands without the Crown's prior consent.

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> *Royal Proclamation 1763, R.S.C. 1985, App. II, No.1.*

In the Maritimes and parts of Quebec, the need for economic and military alliances with Aboriginal people gave rise to the completion in the mid-18th century of peace and friendship treaties with the Mi'kmaq, Maliseet, and Passamaquoddy First Nations. Those treaties did not require the surrender of title to land. Soon after, however, the Crown began to require the surrender of Aboriginal rights and title to land and resources to facilitate settlement. For example, land in the Great Lakes region was ceded through the Williams treaties (1781–1882) and the Robinson treaties (1850).

12 See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

13 See British Columbia, Ministry of Agriculture and Lands, "Crown Land Factsheet," online: http://www.for.gov.bc.ca/land_tenures/documents/publications/crownland_factsheet.pdf.

Starting in 1871 and continuing through to 1921, Canada negotiated 11 numbered treaties across northwestern Ontario, the prairies, and in parts of British Columbia, Yukon, and the Northwest Territories. These treaties required Aboriginal groups to surrender their rights and title to land in exchange for treaty rights. Other than the pre-Confederation Douglas treaties on Vancouver Island and Treaty 8 in the northeast, no other treaties were concluded in British Columbia until 1998.

Approximately 70 treaties were completed between the 18th century and 1921. Those treaties form the basis of the relationship between the Crown and 364 Aboriginal groups. They are located in nine provinces and three territories.

C. Suspension in Treaty-Making

Canada did not pursue treaty-making after Treaty 11 was completed in 1921. In 1927, Canada enacted section 141 of the *Indian Act* which prohibited Aboriginal groups from pursuing land claims and retaining lawyers for such purposes.[14] This provision was repealed in 1951.

There were sporadic but unsuccessful efforts to resolve longstanding Aboriginal claims after the Second World War. A special joint committee of the Senate and House of Commons studied the *Indian Act* between 1946 and 1948 and proposed, among other things, that an Indian claims commission be established to address Aboriginal grievances. A second joint committee of the Senate and House of Commons considered Aboriginal issues between 1959 and 1961. In 1962, the Diefenbaker government introduced legislation to establish an Indian claims commission but the initiative died when the government was defeated. Efforts by the Pearson government to establish a claims commission were also unsuccessful.

In 1964, the Minister of Citizenship and Immigration asked the University of British Columbia to undertake a study of the social, educational, and economic situation of Aboriginal people in Canada. The findings were submitted in two volumes.[15] The authors considered the reasons why Aboriginal Canadians were falling further behind national averages in incomes and spending and advanced the proposition that Aboriginal Canadians should be accorded status as "citizens plus" because of a general misconception they were less than full citizens.

Canada unveiled a new Aboriginal strategy in 1969.[16] The "White Paper" advocated the full, free, and non-discriminatory participation of Aboriginals in Canadian society but proposed to achieve this objective by removing specific references to "Indians" from the Constitution to end the legal distinction between Aboriginals and other Canadians. Land claims were described in the White Paper as general and undefined and not capable of remedy except through a policy that would end injustice to Aboriginal people. The White Paper also expressed doubt whether an Indian claims commission was the right way to deal with grievances. Canada pledged to appoint a commissioner to enquire into and report on grievances relating to the implementation of historic treaties, a role subsequently filled by Lloyd Barber.[17] The White Paper was met with vigorous opposition from Aboriginal organizations across Canada.

14 *Indian Act*, R.S.C. 1927, c. 98, s. 141.

15 Indian Affairs Branch, *A Survey of Contemporary Indians of Canada, Economic, Political, Education Needs and Policies* by H.B. Hawthorn, ed. (Ottawa: Indian and Northern Affairs, volume 1 1966, volume 2 1967).

16 Indian Affairs and Northern Development, "Statement of the Government of Canada on Indian Policy, 1969" presented to the 1st session of the 28th Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development.

17 Canada, Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements — Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985), at pp. 11–12 [*Living Treaties: Lasting Agreements*].

D. Modern Treaty-Making

In the late 1960s, members of the Nishga Indian Tribe (now known as the Nisga'a Nation) commenced a proceeding in the Supreme Court of British Columbia to obtain a declaratory judgment that their Aboriginal title had never been lawfully extinguished. The action was dismissed at trial.[18] The Court of Appeal for British Columbia dismissed an appeal from the trial judgment.[19] In the further appeal to the Supreme Court of Canada, six of seven justices acknowledged the existence of Aboriginal title but could not agree if it applied in British Columbia.[20]

Before *Calder*, Canada believed that Aboriginal title claims could not be easily categorized or recognized because they involved a "bewildering and confusing array of concepts".[21] Following *Calder*, Canada resolved to address Aboriginal land claims.

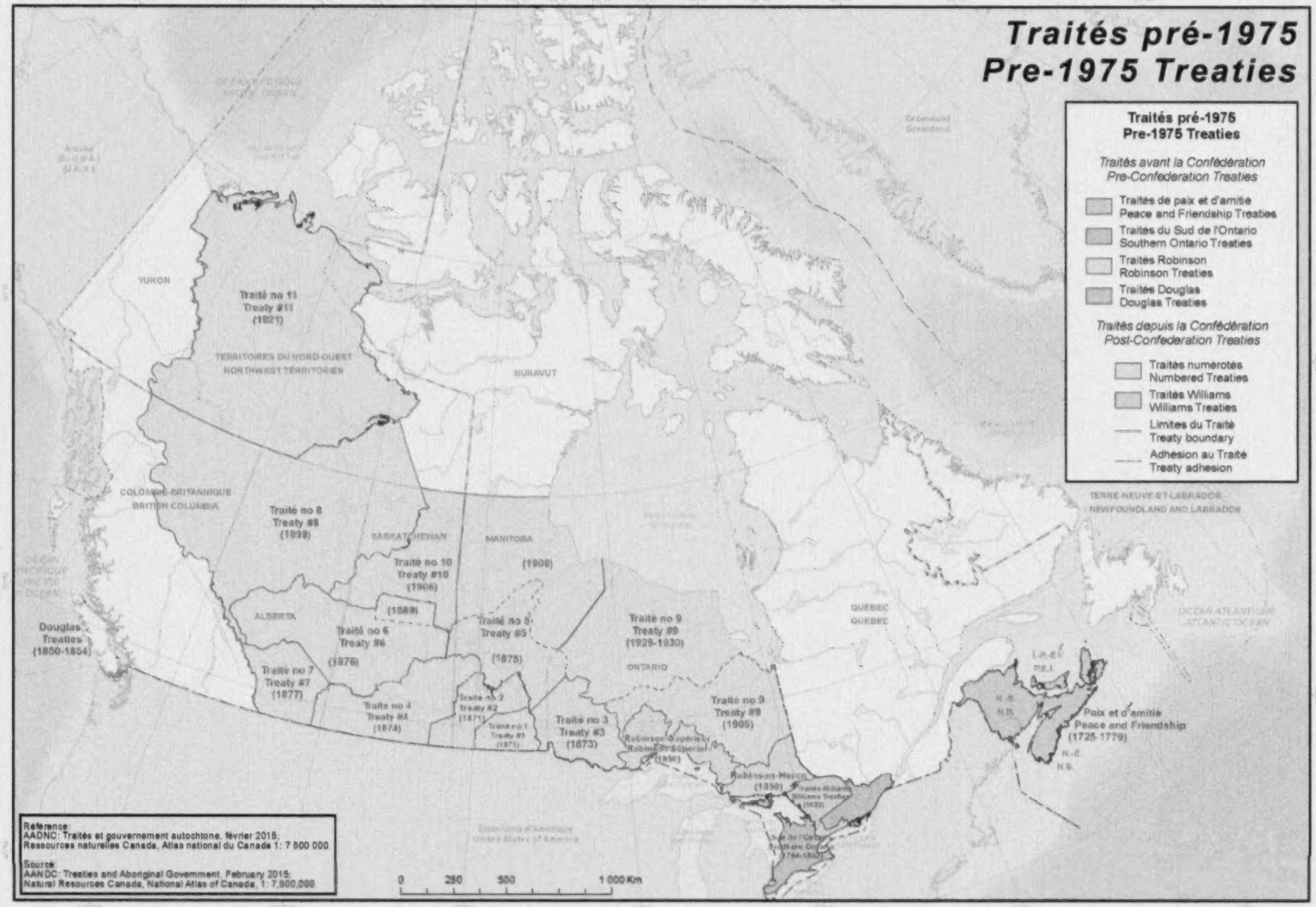
THE 1973 POLICY

In 1973, the Rt. Hon. Jean Chrétien, who was then Canada's Minister of Indian Affairs and Northern Development, published a statement indicating Canada's intention to settle land claims through negotiations.[22] According to the statement, Canada was prepared to provide compensation to native peoples in return for the relinquishment of their interest in lands. Negotiations were contemplated with Aboriginal groups in British Columbia, Northern Quebec, Yukon, and the Northwest Territories. It was Canada's expectation that provinces would participate in the negotiation and settlement of claims and contribute to settlement costs. The statement became Canada's first comprehensive claims policy (the "1973 Policy").

Canada's approach under the 1973 Policy was to accept land claims based on traditional Aboriginal use and occupancy without an admission of legal liability. The term "comprehensive claim" was developed to reflect the nature of the contemplated negotiations which would involve a variety of topics including land title, money, protection of hunting, fishing, and trapping, as well as other rights and benefits in exchange for a release of general and undefined Aboriginal title.[23]

Canada established the Office of Native Claims (the "ONC") in 1974. Aboriginal groups were required to submit information and documentation to the ONC to support their claim. The ONC considered proposed claims in terms of their historic accuracy and legal merit and reported to the Minister who could accept or deny a claim. Canada provided funding through contributions and loans to Aboriginal groups whose claims were accepted for negotiation. Loans were to be repayable as a first charge against monetary compensation in a final agreement. Fifteen claims were accepted for negotiation under the 1973 Policy.

18 *Calder et al. v. Attorney-General of British Columbia* (1969), 8 D.L.R. (3d) 59.
19 (1970), 13 D.L.R. (3d) 64.
20 [1973] S.C.R. 313 [*Calder*].
21 Indian and Northern Affairs Canada, *In All Fairness: A Native Claims Policy — Comprehensive Claims*, (Ottawa: Minister of Supply and Services Canada, 1981), at p. 11 [*In All Fairness: A Native Claims Policy*].
22 Indian and Northern Affairs Canada, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," *Communiqué*, 08 August 1973.
23 *In All Fairness: A Native Claims Policy*, at p. 11.



Services géomatiques, février 2015.
Geomatics Services, February 2015.

Canada

THE 1981 POLICY

In 1981, the Hon. John Munro published a formal comprehensive land claims policy entitled *In All Fairness: A Native Claims Policy* (the "1981 Policy"). The 1981 Policy established three objectives:

- Canada would negotiate fair and equitable settlements of native land claims;
- settlements would enable Aboriginals to live in the way they wish; and
- settlements would respect the rights of other Canadians.

In developing the 1981 Policy, Canada considered the experience of other countries that had completed major settlements of Aboriginal claims, including legislated settlements in Alaska and the Northern Territory of Australia. Canada felt that negotiations, as opposed to legislation, judicial proceedings, or arbitration, were the best means of meeting the interests of Aboriginal groups because negotiations would allow them to participate in the formulation of their own settlements.

The 1981 Policy acknowledged that land claims were based on the concept of "aboriginal title" and negotiations would involve the exchange of undefined Aboriginal rights for specific rights and benefits in a comprehensive agreement. Agreements would be final such that claims could not arise again in the future. There is reference in the 1981 Policy to the urgency of settling land claims in areas of natural resource developments in a way that would offer Aboriginal groups a "choice of lifestyles".

The 1981 Policy established that the interests of non-Aboriginals had to be dealt with equitably in the selection of lands for settlement. The 1981 Policy also acknowledged that some lands were used by more than one Aboriginal group. In those situations, no land in those areas would be granted until any differences between the groups were resolved. Negotiations for local self-government were allowed under the 1981 Policy, *i.e.*, a limited range of local institutions could be established in a settlement area.

The 1981 Policy acknowledged on-going constitutional talks and pledged that the patriation of the Canadian constitution would not affect existing Aboriginal rights or rights that may be acquired by treaty.

The 1973 and 1981 Policies required the Aboriginal signatories to cede, release, and surrender their pre-existing Aboriginal rights. This was reinforced by the legislative extinguishment of those rights.[24]

24 Federal legislation giving effect to the James Bay and Northern Quebec Agreement also unilaterally extinguished all "native claims, rights, title and interests of all Indians and all Inuit in and to the Territory" (provision 2.6). The effect was the extinguishment within the settlement area of the rights of Aboriginal groups who are not party to the agreement.

SECTION 35 OF THE *CONSTITUTION ACT, 1982*

Canada patriated the Constitution in 1982. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights.

Section 35 of the *Constitution Act, 1982*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The constitutional protection of Aboriginal and treaty rights, and subsequent judicial decisions defining the nature, scope, and extent of section 35(1) rights, have had a significant impact in shaping Canada's approach to Aboriginal issues, including the comprehensive land claims policy. One of the important consequences of section 35(1) is that Canada can no longer unilaterally extinguish existing Aboriginal or treaty rights.

THE 1986 POLICY

A new comprehensive land claims policy was announced by the Hon. Bill McKnight in 1986 following two formal reviews of the land claims process (the "1986 Policy").[25] The 1986 Policy was developed following consultations with Aboriginal groups, provincial and territorial governments, and other stakeholders. The 1986 Policy acknowledged the complexity of modern treaty negotiations and the lack of progress in completing treaties. It referred to the legal uncertainty existing at that time about the meaning and content of Aboriginal title, noting that for Aboriginal people the term was bound up with the concept of self-identity and self-determination while for non-Aboriginal Canadians it evoked a wide range of reactions, from sympathy to concern.

By 1986, Aboriginal dissatisfaction with the practice of seeking to extinguish all Aboriginal rights and interests in and to settlement areas had become a significant obstacle to concluding modern treaties. Aboriginal groups expressed concern that "blanket extinguishment" was inconsistent with the constitutional recognition and affirmation of their section 35(1) rights, and that other Aboriginal rights unrelated to the disposition of lands and resources should not be affected by a modern treaty. The 1986 Policy proposed two options, or "certainty techniques", as alternatives to the blanket extinguishment of Aboriginal rights. Canada also indicated its willingness to include offshore harvesting rights and resource revenue-sharing as topics for negotiation. In addition, the 1986 Policy contemplated a process to amend modern treaties in the event specific provisions became unworkable, obsolete, or no longer desirable.

The 1986 Policy reiterated Canada's approach to shared territories and overlapping claims: no land would be granted to any group in a contested area until disputes were resolved.

25 Canada, House of Commons., Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, 32nd Parl, 1st Sess, No 40 (12 October 1983 and 20 October 1983) (Chair: Keith Penner) [*Indian Self-Government in Canada*]; *Living Treaties: Lasting Agreements*.

New claims procedures were introduced in the 1986 Policy, including the requirement for an Aboriginal group to submit a statement of claim describing the extent and location of its traditional territory. The 1986 Policy identified the different stages for negotiations. The first stage contemplated the negotiation of a framework agreement to address the scope, topics, and parameters for negotiations. The next stage involved the completion of an agreement-in-principle. Once approved, final agreement negotiations would commence. The completion of a modern treaty would require formal approval by Canada as well as ratification by the claimant group. The terms of a modern treaty would then be given effect through settlement legislation.

To support the process, the 1986 Policy established interim measures to protect Aboriginal interests during negotiations. It also contemplated completion of implementation plans to accompany final agreements.

The 1986 Policy formalized Canada's internal approval process through the establishment of a committee of assistant deputy ministers with a mandate to review and provide advice to Cabinet about negotiating mandates, framework agreements, agreements-in-principle, and final agreements.

Many of the procedures introduced in the 1986 Policy remain intact.

THE BC TREATY PROCESS

During the Oka crisis in 1990, the Rt. Hon. Brian Mulroney announced a new native agenda to improve relations with Aboriginal people. Canada pledged to accelerate modern treaty negotiations and, in that regard, eliminated the six-claim limit on the number of negotiations that could be undertaken at one time.

Treaty negotiations in British Columbia took on their own focus in 1990. The government of British Columbia abandoned its opposition to land claims negotiations and participated on a task force to recommend how treaty negotiations could begin and what they should include. In 1991, the task force released its report which made 19 recommendations to guide treaty negotiations in that province (the "BC Task Force Report").[26] Canada, the government of British Columbia, and the First Nations Summit, which represented British Columbia First Nations that agreed to participate in modern treaty negotiations, adopted the recommendations, and the British Columbia Treaty Commission was established in 1992.[27]

THE 1993 POLICY

An updated policy that addressed both comprehensive claims and specific claims was announced by the Hon. Tom Siddon in 1993 (the "1993 Policy").[28] The 1993 Policy reaffirmed the objectives of the 1986 Policy, provided an update on the status of negotiations, and revised the acceptance criteria to respond to developments in the law.[29]

The 1993 Policy acknowledged the involvement of provincial and territorial governments in modern treaty negotiations and reported that Canada was negotiating cost sharing agreements with the governments of British Columbia, Newfoundland and Labrador, and Quebec.

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26 British Columbia, British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (28 June 1991) [BC Task Force Report].

27 The British Columbia Treaty Commission is an impartial, arms-length organization established by federal and provincial legislation. Commissioners are nominated by the First Nations Summit (two members), Canada (one member), and British Columbia (one member).

28 Specific claims are claims made by First Nations arising from Canada's obligations under historic treaties or Canada's management of First Nations' funds and assets.

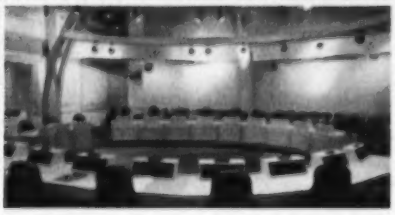
29 In 1990, the Supreme Court of Canada considered the nature of section 35(1) rights for the first time in *Sparrow*. In that decision, the Court established a test to determine if Aboriginal rights were extinguished before 1982. As a result of *Sparrow*, the government amended its claims acceptance criteria so that claims could be rejected only where the Crown exercised a clear and plain intention to unilaterally end a group's Aboriginal rights by lawful means.

THE INHERENT RIGHT POLICY

In 1995, the Hon. Ron Irwin announced Canada's approach to the negotiation and implementation of the inherent right of Aboriginal self-government (the "Inherent Right Policy"). The Inherent Right Policy recognizes the right of Aboriginal groups, protected under section 35(1), to self-govern in relation to "matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources".[30] The policy contemplates the negotiation of both stand-alone self-government agreements and constitutionally protected self-government arrangements in modern treaties.[31]

THE INTERIM POLICY

The Interim Policy represents the first step by Canada to renew its approach to comprehensive land claims. The Interim Policy confirms that modern treaties remain Canada's most comprehensive means of achieving reconciliation with Aboriginal groups with unresolved section 35(1) Aboriginal rights. The document includes much of what has been covered in previous versions of the comprehensive land claims policy about the scope of negotiations as well as processes and procedures. However, the Interim Policy incorporates principles addressing the recognition and reconciliation of section 35(1) rights. The principles were jointly developed by Canada and First Nations leaders, with support from the Assembly of First Nations, in 2013. Importantly, the Interim Policy acknowledges Canada's willingness to consider new measures to address Aboriginal rights both in and outside treaty negotiations, in the form of incremental treaty and non-treaty arrangements.



30 Department of Indian Affairs and Northern Development, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995), online: https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844.

31 Note that issues relating to stand-alone self-government agreements are outside the scope of this report.

CONCLUDED MODERN TREATIES

Since 1973, 26 modern treaties have been concluded under the comprehensive land claims policy:[32]

	DATE SETTLED	BENEFICIARIES	TREATY SETTLEMENT LAND (SQ KM)	CAPITAL TRANSFER ($ IN YEAR COMPLETED)
James Bay and Northern Quebec Agreement	1975	28,497	165,300	$259.8 million
Northeastern Quebec Agreement	1978	1,208	4,500	$9 million
Inuvialuit Final Agreement	1984	4,000	91,000	$95.5 million
Gwich'in Comprehensive Land Claim Agreement	1992	2,500	22,400	$75 million
Council of Yukon Indians Umbrella Final Agreement*	1993	6,000	41,600	$242.6 million
Nunavut Land Claim Agreement	1993	34,028	356,000	$1.148 billion
Sahtu Dene and Métis Comprehensive Land Claim Agreement	1994	3,200	41,400	$75 million
Nisga'a Final Agreement	1998	6,200	2,000	$253 million
Tlicho Agreement	2003	3,897	39,000	$152 million
Labrador Inuit Land Claims Agreement	2005	7,102	15,800	$183.2 million
Nunavik Inuit Land Claims Agreement	2006	11,048	5,500	$57.2 million
Tsawwassen First Nation Final Agreement	2007	435	7	$15.9 million
Maa-nulth First Nations Final Agreement	2009	2,200	245	$96.7 million
Eeyou Marine Region Land Claims Agreement	2010	17,449	1,650	$50 million
Yale First Nation Final Agreement	2013	160	20	$12.9 million
Tla'amin Final Agreement	2014	1,100	83	$29.7 million

* Eleven separate treaties were completed under the Yukon umbrella agreement: Champagne & Aishihik Final Agreement (1995); Teslin Tlingit Final Agreement (1995); Nacho Nyak Dun Final Agreement (1995); Vuntut Gwitchin First Nation Final Agreement (1995); Selkirk First Nation Final Agreement (1997); Little Salmon/Carmacks Final Agreement (1997); Tr'ondëk Hwëch'in Final Agreement (1998); Ta'an Kwäch'än Council Final Agreement (2002); Kluane First Nation Final Agreement (2004); Kwanlin Dun First Nation Final Agreement (2005); and Carcross/Tagish First Nation Final Agreement (2005).

MODERN TREATIES UNDER NEGOTIATION

Although 26 modern treaties have been completed since 1973, much work remains to be done. There are currently 75 comprehensive land claims negotiations across Canada at various stages of progress:

- 14 comprehensive land claim negotiations outside of British Columbia;
- eight transboundary land claim negotiations; and
- 53 negotiation tables in the BC treaty process.

Appendix B sets out a complete list of negotiation tables.

32 See Aboriginal Affairs and Northern Development Canada, *General Briefing Note on Self-Government and Comprehensive Land Claims Policies and the Status of Negotiations* (February 2014), online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_briefing_note_information_1373548932106_eng.pdf for further information on each completed treaty. Note that treaty settlement land quanta have been rounded.

E. Past Reports on Canada's Approach to Negotiating Aboriginal Rights Claims

Periodically, Canada has commissioned studies and published reports about the comprehensive land claims process. Those reports provide an important historical perspective and include:

- the 1983 report, *Indian Self-Government in Canada: Report of the Special Committee* (the "Penner Report");
- the 1985 report, *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (the "Coolican Report");
- the 1995 report, *Canada and Aboriginal Peoples: A New Partnership* (the "Hamilton Report");[33]
- the 1996 *Report of the Royal Commission on Aboriginal Peoples* (the "Royal Commission Report");[34]
- the auditor general of Canada's November 2006 report to the House of Commons;[35]
- the 2008 interim report of the Standing Senate Committee on Aboriginal Peoples regarding modern treaty implementation entitled *Honouring the Spirit of Modern Treaties: Closing the Loopholes*;[36]
- James Lornie's 2011 report about accelerating negotiations in the BC treaty process (the "Lornie Report");[37] and
- the 2012 report of the Standing Senate Committee on Aboriginal Peoples entitled *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process*.[38]

Many of the issues I have considered are neither new nor unforeseen. The observations, findings, and recommendations of these reports remain relevant and compelling despite the passage of time, legal developments, and changes in policy having placed some of the issues in a different context.

33 A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership, Report of Hon. A.C. Hamilton, Fact-finder for Minister of Indian Affairs and Northern Development* (Ottawa: Minister of Public Works and Government Services Canada, 1995) [*A New Partnership*].

34 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, 5 vols. (Ottawa: Minister of Supply and Services Canada, 1996) [*Royal Commission Report*].

35 Office of the Auditor General of Canada, *2006 Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, November 2006), Chapter 7 – Federal Participation in the British Columbia Treaty Process, online: http://www.oag-bvg.gc.ca/internet/docs/20061107ce.pdf [2006 Auditor General of Canada Report].

36 Canada, Senate, Standing Senate Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes, Interim Report, Special study on the implementation of comprehensive land claims agreements in Canada*, 39th Parl, 2nd Sess (May 2008) (Chair: Hon. Gerry St. Germain, P.C.) [*Honouring the Spirit of Modern Treaties*].

37 James M. Lornie, *Final Report with Recommendations Regarding the Possibility of Accelerating Negotiations With Common Table First Nations that are in the BC Treaty Process, and Any Steps Required* (30 November 2011) [*Lornie Report*].

38 Canada, Senate, Standing Senate Committee on Aboriginal Peoples, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process*, 41st Parl, 1st Sess (June 2012) (Chair: Hon. Gerry St. Germain, P.C.) [*A Commitment Worth Preserving*].

SECTION 3 — Evolution of the Legal Landscape

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Aboriginal people lived in North America in organized and distinct societies before the arrival of European explorers. When the British Crown asserted sovereignty over present-day Canada it accepted the existence of the property and customary rights of the Aboriginal inhabitants. In other words, the Crown took the land subject to pre-existing Aboriginal rights. It is the pre-existence of these societies and their distinctive rights that are recognized in Canadian law and distinguish Aboriginals from other minority groups in Canada.[39]

Aboriginal people were not conquered. Moreover, the idea that no one owned the land prior to European colonization (referred to as the doctrine of *terra nullius*) never applied in Canada. The British Crown customarily accepted the existing rights of a territory's inhabitants upon the assertion of sovereignty.[40] In Australia, the Australian High Court acknowledged the Crown took the territories of that country subject to existing Aboriginal rights in the land.[41] Similarly, the United States Supreme Court also recognized the rights of Aboriginals in the lands they traditionally occupied before European colonization.[42]

Contemporary legal developments start with the inclusion of section 35 in the *Constitution Act, 1982*. Subsequent judicial decisions about section 35 have established legal principles to guide Crown-Aboriginal relations, including the duty to consult, reconciliation, and the honour of the Crown.

SECTION 35

Section 35 was enacted as part of the Canadian constitution in 1982. Before 1982, Aboriginal rights existed and were recognized under the common law but because they did not have constitutional status, they were vulnerable to extinguishment or regulation by legislation. Since the enactment of section 35, Aboriginal rights cannot be extinguished except by agreement, and can only be regulated or infringed by the Crown where justified.

Section 35 does not identify the range or nature of Aboriginal rights. Canadian courts have provided guidance for determining the content, nature, and scope of Aboriginal and treaty rights, and the Crown's obligations in respect of those rights. Judicial decisions have played a major role in policy development and have provided guidance on balancing and reconciling section 35(1) rights with the rights and interests of Canadian society as a whole.

The Supreme Court of Canada has defined Aboriginal rights as the modern exercise of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right.[43] Aboriginal rights are not general or universal but must be determined on a case-by-case basis.

39 See *Calder* at 375; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 30–31 [*Van der Peet*].
40 See, *e.g.*, *In re Southern Rhodesia*, [1919] A.C. 211 (P.C.); *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.).
41 *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1.
42 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
43 *Van der Peet*, at para. 47.

Consequently, the fact that one Aboriginal group has an Aboriginal right will not be sufficient to demonstrate that another Aboriginal group has the same right.

Aboriginal title is a sub-category of Aboriginal rights and is a right to exclusive use and occupation of the land itself. While the Supreme Court of Canada acknowledged the possibility of Aboriginal title in 1973, the first declaration of Aboriginal title was only made by the Court last year.[44]

> In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation....[Sufficient occupation] is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control...
>
> McLachlin C.J., *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 50.

THE DUTY TO CONSULT

One of the more significant developments in Aboriginal law is the duty of the Crown to consult Aboriginal groups where their claimed or proven section 35(1) rights may be adversely affected by Crown conduct.[45] This is a substantial obligation because if consultation or accommodation is found to be inadequate, Crown decisions can be suspended or set aside. The duty to consult has provided Aboriginal groups with leverage to safeguard their section 35(1) rights along with the ability to negotiate a range of benefits without the need to prove their rights or exchange or modify those rights as required by modern treaties.

In *Tsilhqot'in*, the Court elaborated on the content of the Crown's duty to consult in relation to conduct that may affect Aboriginal title land. The Court provided pointed advice: the Crown can always avoid a charge of failing to adequately consult by obtaining the consent of the interested Aboriginal group where proposed Crown conduct may adversely affect claimed Aboriginal title land.[46]

RECONCILIATION

The Court has affirmed that the fundamental objective of Aboriginal law is the "reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions".[47] This has been a consistent message since the enactment of section 35. Despite judicial decisions being significant contributors to the evolution of the Crown-Aboriginal relationship, the Court has emphasized that the process of reconciliation should take place through negotiations, guided by judicial principles the Court has developed.

44 See *Tsilhqot'in*.

45 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

46 *Tsilhqot'in*, at para. 97. *Haida Nation* confirmed, however, that the duty to consult "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim" (para. 48).

47 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 1 [*Mikisew Cree*].

THE HONOUR OF THE CROWN

The Court continues to emphasize that the "honour of the Crown is always at stake" in Canada's relationship with Aboriginal people.[48]

> This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.
>
> McLachlin C.J., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 32.

The honour of the Crown is not a legal duty or obligation but refers to a standard of conduct. It has become a robust legal principle that imposes substantial obligations and liabilities on the Crown. The honour of the Crown gives rise to specific duties depending on fact-specific circumstances and the nature of the promises made.

The source of this concept is not entirely settled.[49] One theory argues that it flows from a general principle of imperial law that governed the Crown's assertion of sovereignty over Aboriginal peoples, requiring it to act honourably and respect their rights. Another theory characterizes the standard as voluntarily created by the Crown when it asserted sovereignty over the Aboriginal peoples of Canada through the Royal Proclamation, committing itself to the groups' protection. Previously, the honour of the Crown found expression in the "sanctity of the word of the white man".[50] Regardless of the source, courts presume a high standard of conduct by the Crown. Furthermore, this area of law is steadily evolving and the scope of potential legal duties arising from the honour of the Crown continues to expand.

> Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.
>
> McLachlin C.J., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 20.

The honour of the Crown has been applied to assess the standard of Crown conduct in relation to treaty-making,[51] the interpretation of historic treaties,[52] the implementation of modern treaties,[53] and the implementation of constitutional obligations to Aboriginal peoples.[54] The honour of the Crown requires diligent, prompt, effectual, and equitable implementation or fulfillment of promises; a pattern of repeated mistakes, inaction, indifference, delay, inattention, or carelessness is objectionable.[55]

48 *Haida Nation*, at para. 16.
49 Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 20 Sup. Ct. L. Rev. 433.
50 *R. v. White* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.).
51 See *Haida Nation*.
52 See *Mikisew Cree*.
53 See *Little Salmon/Carmacks*.
54 *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623[*Manitoba Métis Federation*].
55 *Manitoba Métis Federation*, at paras. 79, 82–83, 97–99, 106–107, and 109.

LITIGATION

Despite the Court's preference that reconciliation be pursued through good faith negotiations, litigation continues to dominate Crown-Aboriginal relations. Several federal departments and agencies are involved in Aboriginal rights litigation.[56] AANDC alone is a party in 452 proceedings involving section 35(1) rights.[57] Aboriginal title is raised in 157 active claims involving Canada and it is foreseeable that some of these actions may proceed to trial as a result of the Court's declaration in *Tsilhqot'in*.[58]

The cost of Aboriginal rights litigation is significant. AANDC spent in excess of $100 million for litigation legal services over the past five years and the annual amount has been relatively consistent during that time. In some circumstances, the Crown is required to indemnify Aboriginal participants for costs incurred in a proceeding. For example, in *Tsilhqot'in*, Canada and British Columbia were required to fund the plaintiffs' litigation costs, in addition to their own, which amounted to more than $20 million.[59]

Aboriginal rights claims highlight the tremendous inefficiencies of litigation as a dispute resolution tool. Judicial proceedings are time-consuming and expensive and do not always provide certainty of result. It can take decades from the date a cause of action arises to the exhaustion of the right to appeal.[60] Unique aspects of the treatment of evidence in Aboriginal rights claims, including expert opinions and oral histories about pre-contact practices, draw out proceedings. Trials can be multi-year events.[61] Despite the significant expenditure of time and resources, many Aboriginal rights cases do not resolve the underlying issue between the parties. Decisions rarely result in a straightforward outcome with one party winning and the other losing. *Delgamuukw*, for example, resulted in an order for a new trial.[62] While the Tsilhqot'in Nation obtained a declaration of title in its action, implementing the decision will require negotiations with the Crown. There are also examples of Canada being slow, or worse reluctant, to carry out required policy changes that result from judicial decisions.[63]

Reliance on litigation to resolve disputes also creates the risk of expanding Crown liability in unpredictable ways, particularly where courts are being called on to interpret and resolve historical, political, and social policy issues.[64]

Over the past 25 years, the Supreme Court of Canada has provided guidance to assist the Crown and Aboriginal groups in characterizing the nature, scope, and content of Aboriginal rights, including insight about justifiable limitations on those rights. The Court has also outlined a general framework the Crown must adopt to discharge the duty to consult and accommodate, and has provided a spectrum for assessing the strength of Aboriginal rights claims. At the same time, the Court has stated that Aboriginal claimants cannot frustrate the process, nor should they take unreasonable positions.

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56 Canada does not maintain a single repository of section 35 proceedings across departments. Departments other than AANDC are often parties in claims involving section 35(1) rights and claims relating to the duty to consult. Since 2006, the number of claims based on a failure to consult continues to grow.

57 This number only includes litigation under the control of the Aboriginal affairs portfolio of the Department of Justice.

58 This number includes Aboriginal title claims of any kind, including protective writs and both inactive and active litigation, but is only in relation to civil litigation matters. It does not include prosecutions where Aboriginal title is raised as a defence or duty to consult litigation that includes an allegation of a failure to consult on a claim of asserted title. Aboriginal title claims have been commenced in every Canadian jurisdiction.

59 This amount is cumulative, from the commencement of the action to the outcome of the appeal in the Supreme Court of Canada. It does not include Canada's own legal costs which exceeded $9 million.

60 To illustrate this point, the Manitoba Métis action was filed in 1981 but judgment was not pronounced until 2007. The Manitoba Court of Appeal affirmed the trial decision in 2010, and the Supreme Court of Canada's decision was pronounced in 2013.

61 The evidence and submissions at the *Delgamuukw* trial took 374 days to complete. *Tsilhqot'in* proceeded to trial in 2002 and continued for 339 days over a period of five years.

62 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

63 For example, in the 15 years since the Supreme Court of Canada's decision in *Delgamuukw*, Canada has not yet developed an Aboriginal title policy.

64 In *Manitoba Métis Federation*, Rothstein J. observed in a dissenting judgment that there are many examples in Canadian history where the Crown has acted in ways that would now be considered inappropriate, offensive, or appalling, but in his view it is best left to Parliament to determine how to handle those historical circumstances (at para. 264–5).

There is an expectation by the courts that claims for the recognition of Aboriginal rights will be resolved through a process of discussion and compromise and not by trial judgments and appeals. What this means on a practical level is that assertions of Aboriginal rights, including title, should be the starting point for dialogue rather than provoking an impasse. It is impractical to seek judicial intervention every time the Crown's duty to consult is engaged. More than ten years after *Haida Nation*, all parties should be well versed about their respective obligations. Ideally, the Crown and Aboriginal groups should jointly assess the nature of claimed rights. Perhaps more challenging is the determination whether a "compelling and substantial purpose" justifies the infringement of an Aboriginal right or incursion on Aboriginal title land.[65] Nevertheless, the parties are expected to make good faith efforts to ensure Aboriginal rights, including title, can be exercised in a manner that accommodates the interests of Aboriginal groups and Canadian society as a whole.

Differences will inevitably arise and there will always be recourse to litigation. But there is an opportunity for the Crown and Aboriginal groups to use the courts in a more strategic fashion, one that avoids the specter of multi-decade trials and appeals, while providing guidance or instruction on discrete issues. For example, in *Haida Nation*, the Court noted that difficulties associated with the absence of proof should not derail negotiations, and that courts or tribunals are available to assist when difficulties arise.[66] Superior courts offer dispute resolution services as well as procedures for the determination of discrete issues by way of petition, summary trial, or stated case. The strategic use of the courts can complement good faith negotiations.

THE IMPACT OF *TSILHQOT'IN*

On 26 June 2014, the Supreme Court of Canada issued a declaration that the Tsilhqot'in Nation in British Columbia holds Aboriginal title to more than 1,700 square kilometres of land in that province. *Tsilhqot'in* became a focal point at engagement meetings. Many Aboriginal groups presume the declaration means that they too hold Aboriginal title. Groups in every region contend that their consent is now required for resource development projects. Some are not prepared to wait for the Crown or judiciary to recognize their Aboriginal title. In July 2014, some members of the Gitxsan Nation purported to evict forest companies, CN Rail, and the sports fishery from their asserted traditional territory in British Columbia. In September 2014, the Atikamekw Nation in Quebec issued a declaration of sovereignty over their asserted traditional territory which they call Nitaskinan.[67]

The fact the Interim Policy does not reference *Tsilhqot'in* is seen by some Aboriginal groups as a purposeful omission and has fueled speculation that Canada will avoid addressing claims of Aboriginal title.

Canada's failure to publicly respond to *Tsilhqot'in* has produced what has largely been a one-sided dialogue about the significance of the decision and the attributes of Aboriginal title. Few have acknowledged the lack of clarity and certainty about limitations on the use of Aboriginal title land.[68] The practical implications of Aboriginal title have also been largely ignored. Although the Court reiterated that incursions on Aboriginal title land are permitted when justified by a "compelling and substantial purpose", there has been little acknowledgement or discussion of this important qualification, despite the current range of proposed resource development projects that may qualify.

65 See *Sparrow* and *Tsilhqot'in*.

66 *Haida Nation*, at para. 37. The presentation of evidence in *The First Nation of Nacho Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69 provides an example of procedural efficiencies in Aboriginal litigation.

67 See http://www.atikamekwsipi.com/fichiers/File/declaration_souverainete_signe.pdf.

68 An exception is Kenneth Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tsilhqot'in decision* (Macdonald Laurier Institute: September 2014), online: http://www.macdonaldlaurier.ca/files/pdf/MLITheEndIsNotNigh.pdf.

> The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.
>
> Lamer C.J., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 165. [Emphasis in original.]

In the absence of Canada's participation in the post-*Tsilhqot'in* conversation, two Aboriginal organizations in British Columbia have set the parameters for discussions. In September 2014 the First Nations Leadership Council[69] advanced the following principles to guide Crown-Aboriginal relations:

- acknowledgement that all our relationships are based on recognition and implementation of the existence of indigenous peoples' inherent title and rights, and pre-confederation, historic and modern treaties, throughout British Columbia;
- acknowledgement that indigenous systems of governance and laws are essential to the regulation of lands and resources throughout British Columbia;
- acknowledgment of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition; and
- we immediately must move to consent based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.[70]

The Carrier Sekani Tribal Council, which represents the interests of eight First Nations in north-central British Columbia, published the statement excerpted below. While confirming its interest in working collaboratively with the Crown to facilitate project development, the council nevertheless indicated that collaboration will have to accommodate unextinguished Aboriginal rights including title:

> Presently development of mining, fishery, forestry, land and energy resources are substantial economic drivers. This is the major source of all wealth creation supporting jobs and business development. There is no good reason for First Nations to be on the sidelines of these economic activities. While properly taking care of the environment, protecting traditional food sources and security and planning for and acting on the inevitable social impacts First Nations should also see economic benefits, including revenues and jobs, from our traditional lands and resources. As everyone knows the social-economic gaps our people

69 The council is composed of the political executives of the First Nations Summit, the BC Assembly of First Nations, and the Union of BC Indian Chiefs.

70 First Nations Leadership Council, Statement, "B.C. Government and First Nations leaders look to future of reconciliation" (11 September 2014), online: http://www.fns.bc.ca/pdf/2014-09-11%20-FNLC-Statement-re-FN-Forum-with-Premier-and-Cabinet.pdf.

> face are significant. We are addressing these in a constructive and proactive way and we need governments to be full partners in this.
>
> ...
>
> We are the original owners of the lands and resources in our respective territories and we have aboriginal rights and aboriginal title to our lands and resources. The Constitution of Canada "recognizes and affirms" this. We have never given this up. As the Supreme Court of Canada stated in Tsilhqot'in and given the significant impacts arising from LNG and other resources development we are firm in our view that our respective First Nation's consent is absolutely necessary. Any agreement with our First Nations about our traditional lands and resources will require this standard.[71]

Canada is not under a moral or legal duty to agree with every position advanced by Aboriginal groups, but there is a need for Canada to be present for the discussion. Conversely, Aboriginal representatives need to acknowledge that their communities are part of the broader Canadian social, political, and economic community over which the Crown is sovereign. Hard bargaining, balance, and compromise are to be expected of the parties in advancing their respective positions.

Canada acknowledges in the Interim Policy that negotiations are the preferred way to advance section 35(1) rights and that Aboriginal communities need to be provided access to economic development opportunities to create jobs and economic growth.[72] From Canada's perspective, doing so will promote a secure climate for economic and resource development that benefits all Canadians and balances Aboriginal rights with broader societal interests.

The Aboriginal position is remarkably similar. Grand Chief Stewart Phillip, president of the Union of BC Indian Chiefs, explained as follows: "First Nations are trying to reconcile history, to live with pride and dignity and to benefit from the land. They are sick and tired of being completely impoverished living on postage stamps. They want to be involved in the economy. It's not a lot to ask for."

There is also an acknowledgement within Aboriginal communities about what is at stake. As another Aboriginal leader put it, a "no" to resource development projects is a resounding "yes" to the status quo.

What is standing in the way? Acrimony and mistrust are the consequences of a historically difficult relationship. A rapidly evolving legal environment has added to the instability and uncertainty. There is not an obvious path or immediate fix, although the importance of constructive dialogue cannot be overstated. This will require determined efforts by Crown and Aboriginal representatives to develop and maintain relationships and work through conflicting perspectives and difficult issues. There are bound to be disagreements but headway will not be realized without acknowledging and considering each other's interests. Crown representatives may not have a ready appetite to discuss the implementation of the First Nations Leadership Council's proclamation. Nor will Aboriginal leaders want to address the range of circumstances that may justify an infringement of claimed Aboriginal title. But these issues need to be confronted and resolved. Development of key areas of Canada's economy will depend on the reasonable accommodation of interests. Progress is best measured incrementally. There is much to discuss.

71 Carrier Sekani Tribal Council, *Editorial from Carrier Sekani Chiefs — Premier's Natural Resource Forum*, 19 January 2015, online: http://www.carriersekani.ca/images/docs/CSTC%20Editorial.Natural%20Resources%20Forum.pdf.

72 Interim Policy, at p. 6.

SECTION 4 — A New Reconciliation Framework

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The Interim Policy acknowledges the objective of reconciling the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty over Canadian territory, thereby balancing Aboriginal rights with broader societal interests through compromise and good faith negotiations. More specifically, the Interim Policy presumes that Aboriginal and non-Aboriginal Canadians share a common interest in promoting a secure climate for economic and resource development. The principal thrust of the Interim Policy is to address Aboriginal rights through a process of negotiations.

> Diversity is part of the Canadian fabric. We thrive on it. But it also produces moments of challenge. Managing diversity is the ongoing Canadian project. And in managing it, we define ourselves. One such moment — the ramifications of which we are still living with today — was the recognition…of the constitutional imperative of achieving reconciliation between Canada's First Nations and the Crown.…Reconciliation takes a hard look at what Canada is, divisions and all, and says, for the good of us all, we need to make peace and build a better future.
>
> The project of reconciliation, while our best way forward, is not an easy way. It is not a finite task but a process. Reconciliation requires openness of spirit, endurance and great patience. But I believe that it is worth the effort.
>
> *Remarks of the Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, to the Canadian Club of Ottawa, 05 February 2013.*

The theory of reconciliation has its origins in section 35 and was first articulated by the Supreme Court of Canada in *Sparrow*, a 1990 decision involving the Aboriginal fishing rights of the Musqueam Indian Band.[73] Since then, the Court has developed reconciliation to embrace a larger perspective. It has been described as the "fundamental objective of the modern law of aboriginal and treaty rights".[74]

Reconciliation is intended to address in a contemporary manner the historic fact that the Crown obtained control over the lands and resources that were in the control of Aboriginal peoples prior to European settlement of present-day Canada. The Court has repeatedly encouraged the Crown and Aboriginal groups to negotiate settlements in good faith with give and take on all sides to address this historic fact.[75]

73 *Sparrow*, at p. 119.
74 *Mikisew Cree*, at para. 1.
75 *Delgamuukw*, at para. 186; *Haida Nation*, at para. 38; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, at paras. 38 and 83 [*Rio Tinto*];

> Finally, this litigation has been both long and expensive...Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.
>
> Lamer C.J., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186.

I invariably asked participants at engagement meetings to articulate their concept of reconciliation. The responses varied. Many endorsed the objective of enabling Aboriginal communities to access economic benefits that meet their immediate needs as well as those of future generations. Aboriginal groups generally support the Interim Policy's emphasis on creating economic development opportunities, jobs, and economic growth for Aboriginal communities. However, some representatives made the point that Canada's vision of reconciliation must be more expansive than simply facilitating Aboriginal participation in the economy. Others bristled at the reference to compromise in the Interim Policy, contending that reconciliation is a Crown initiative designed to subvert Aboriginal interests. Many feel that reconciliation will become a meaningless concept if the Crown fails to address Aboriginal interests in a generous and timely manner.

Some referenced the United Nations Declaration on the Rights of Indigenous Peoples as a blueprint for reconciliation. For First Nations in central British Columbia, the historic Laurier declaration is relevant to and ought to inform the process of reconciliation.[76] Others identified Canada's statement of apology to former residents of Indian residential schools as consistent with the objectives of reconciliation.

> The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey....
>
> A cornerstone of the Settlement Agreement is the Indian Residential Schools Truth and Reconciliation Commission. This Commission presents a unique opportunity to educate all Canadians on the Indian Residential Schools system. It will be a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.
>
> *Statement of Apology to Former Students of Indian Residential Schools. On behalf of the Government of Canada, the Rt. Hon. Stephen Harper, Prime Minister of Canada, 11 June 2008.*

Reconciliation is more than a legal theory. At a practical level, it is the product of successful relationships. To illustrate, project proponents and Aboriginal groups routinely conclude impact and benefit agreements. Their negotiations do not focus on the theory of reconciliation. Rather, their objective is to complete strategic agreements to facilitate project development in a way that addresses Aboriginal interests. It is the effect of these partnerships that achieves the goals of reconciliation.

76 A delegation of the chiefs of the Shuswap, Okanagan, and Couteau Tribes of British Columbia presented Prime Minister Laurier with a declaration of their position when he visited Kamloops on 25 August 1910. The document, entitled "Memorial to Sir Wilfred Laurier, Premier of the Dominion of Canada", was dictated by the chiefs to J.A. Teit and set out their positions with respect to their continued claim to Aboriginal title over their territories and their desire for a treaty with the Crown.

Some provinces and territories recognize that reconciliation is an ongoing process and can be pursued in incremental steps. There are lessons in this for federal policy makers.

The Interim Policy acknowledges that a new framework for addressing section 35 rights is required.[77] It confirms that modern treaties remain the most comprehensive arrangements to address section 35 rights. However, it also recognizes that non-treaty and incremental treaty arrangements are among the range of reconciliation approaches that should also be made available. The references to reconciliation in the Interim Policy are important but it is critical for Canada to connect reconciliation to tangible outcomes in Aboriginal communities.

Canada requires a variety of policies and initiatives to reconcile constitutionally protected Aboriginal and treaty rights in a way that meets the interests of all Aboriginal groups. Canada should continue its efforts to complete modern treaties but comprehensive land claims should not be Canada's sole focus for advancing reconciliation. There are other, more timely initiatives that meet the strategic interests of both Canada and Aboriginal groups.

RECOMMENDATIONS

1. Canada's new reconciliation framework should include a renewed and reformed comprehensive land claims policy along with a wider spectrum of policies and initiatives to reconcile constitutionally protected Aboriginal and treaty rights.

2. The new reconciliation framework should reflect the historic, cultural, and regional diversity among Aboriginal communities to effectively address Aboriginal and treaty rights.

3. A "whole of government" commitment is required, with high level direction and oversight, to implement the new reconciliation framework.

A. Modern Treaties

Modern treaties provide Aboriginal communities with the means to pursue political, social, cultural, and economic independence. They also benefit all Canadians by clearly defining the ownership and jurisdiction of land and resources within claimed traditional territories.

There is empirical evidence that modern treaties improve community well-being.[78] The experience in treaty communities supports this proposition. For example, it is generally acknowledged that socio-economic outcomes for the 11 Yukon treaty First Nations are better now than pre-treaty and exceed those of the non-treaty First Nations in that region.

Modern treaties also represent the fulfillment of an Aboriginal community's longstanding aspirations. The Nisga'a people in northern British Columbia are immensely proud of their treaty, which was completed in 1998. The Nisga'a began petitioning the Crown in the late 19th century for recognition of their connection to and ownership of their traditional territory. The Nisga'a treaty ended uncertainty about ownership of land and resources, severed the community's connection to the *Indian Act*, and established the legal foundation for the Nisga'a to conduct their own affairs. There are specific features of the Nisga'a treaty that reflect the community's

77 See Interim Policy, at p. 3.

78 AANDC has developed a community well-being index that measures the quality of life of First Nations and Inuit communities relative to other communities based on indicators of education, income, labour force activity, and housing that are derived from Statistics Canada's Census of Population and combined to give each community a well-being "score". Between 1981 and 2006, the well-being of modern treaty communities increased at nearly twice the pace of historic treaty communities. Note this index does not separate Métis communities for comparison. The index has not been updated since 2006. For a more detailed description see Aboriginal Affairs and Northern Development Canada, *Measuring Well-Being: The Community Well-Being (CWB) Index*, online: http://www.aadnc-aandc.gc.ca/eng/1100100016579/1100100016580.

vision of building a sustainable economy, including constitutionally protected jurisdiction over land and resources and a Nisga'a-specific environmental assessment process.

Similarly, the Tsawwassen final agreement reflects that community's vision of obtaining jurisdiction over land and resources in an urban environment thereby increasing community well-being through economic development initiatives. Today, the Tsawwassen First Nation is undertaking $1.4 billion in retail, residential, industrial, and agricultural developments on treaty settlement lands, making it a significant contributor to the British Columbia economy.

Treaty-making is supported by industry, which sees modern treaties as the best and preferred way to establish a legal framework to clarify the attributes and geographic extent of Aboriginal rights, thereby contributing to a more stable, competitive, and predictable environment for economic and resource development.[79]

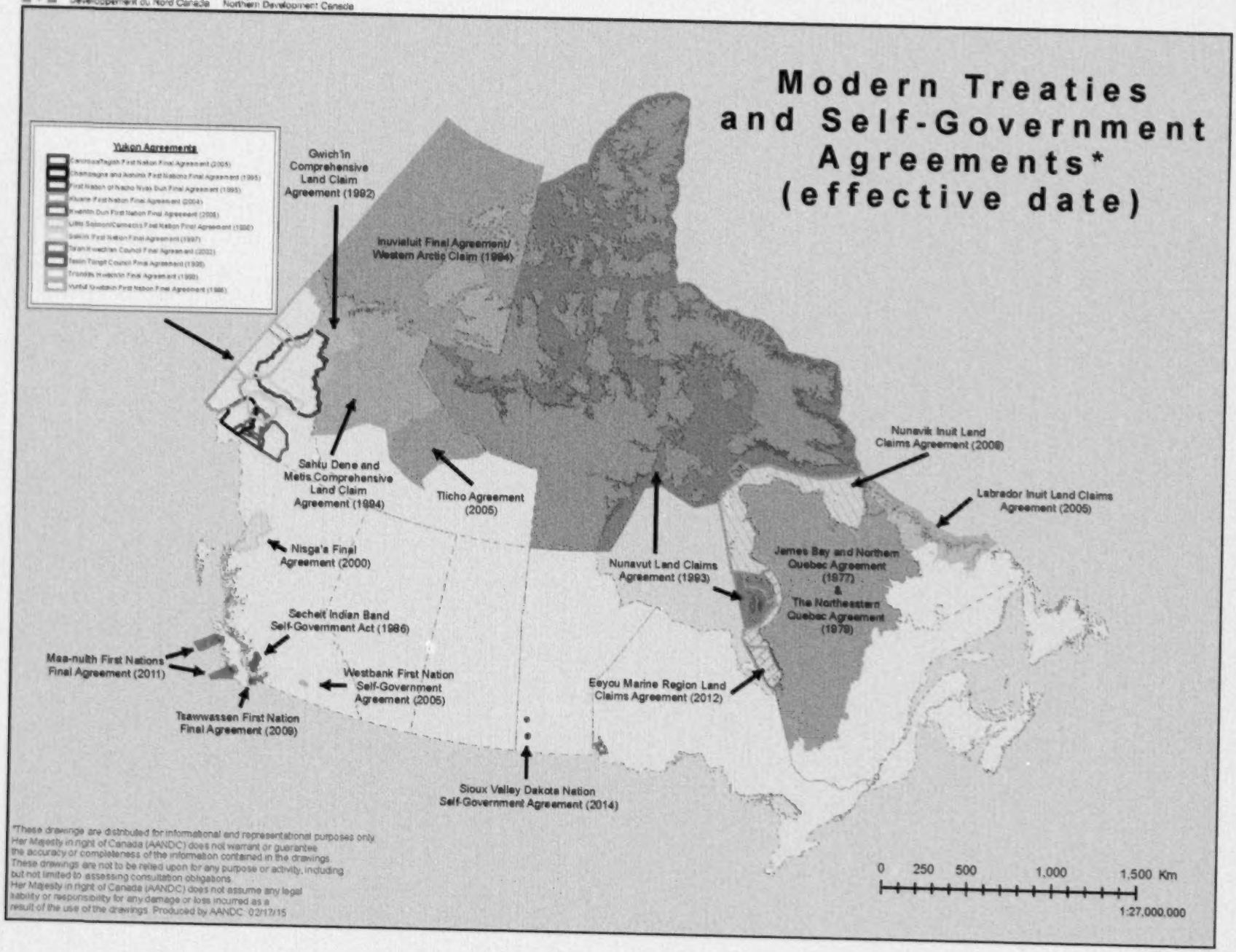
The Interim Policy reflects Canada's perspective that modern treaties establish a mutually agreed-upon and enduring framework for reconciliation and ongoing relationships between the Crown and Aboriginal people, and remain the most comprehensive arrangements for addressing section 35(1) rights. A modern treaty provides not only ownership of land and resources but also self-government and other law-making powers, harvesting rights, a cash settlement, and ongoing funding for the implementation of the treaty. While *Tsilhqot'in* has given support to and elevated the expectations of Aboriginal groups, many important issues were not resolved by the Court's declaration. For example, the decision does not address the practical implications of Aboriginal title. As a result, the Tsilhqot'in Nation's Aboriginal title is a starting point for discussions with the government of British Columbia and Canada to address a wide range of related issues, many of which are the focus of modern treaty negotiations. Failure to reach agreement may produce yet more litigation.

Some Aboriginal groups have raised concerns that modern treaties result in the application of provincial jurisdiction over former reserve lands and the phasing out of section 87 *Indian Act* tax exemptions. These changes are seen as a disincentive by some for concluding a modern treaty. Other Aboriginal groups, however, support modern treaties because they provide constitutionally protected governance rights over a larger land base (the group's treaty settlement lands) than existing reserves and the ability to create and manage fee simple interests.

79 *Competitiveness is the measure of Canada against other jurisdictions in terms of the risk, cost, and time required for project development. Predictability relates to the establishment of a legal framework that settles the rights of parties and rules for development.*

Affaires autochtones et Développement du Nord Canada
Aboriginal Affairs and Northern Development Canada

Modern Treaties and Self-Government Agreements* (effective date)


Yukon Agreements
Gwich'in Comprehensive Land Claim Agreement (1992)
Inuvialuit Final Agreement/ Western Arctic Claim (1984)
Sahtu Dene and Metis Comprehensive Land Claim Agreement (1994)
Tlicho Agreement (2005)
Nisga'a Final Agreement (2000)
Sechelt Indian Band Self-Government Act (1986)
Maa-nulth First Nations Final Agreement (2011)
Westbank First Nation Self-Government Agreement (2005)
Tsawwassen First Nation Final Agreement (2009)
Sioux Valley Dakota Nation Self-Government Agreement (2014)
Nunavut Land Claims Agreement (1993)
Nunavik Inuit Land Claims Agreement (2008)
Labrador Inuit Land Claims Agreement (2005)
James Bay and Northern Quebec Agreement (1977) & The Northeastern Quebec Agreement (1978)
Eeyou Marine Region Land Claims Agreement (2012)
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Canada

Modern Treaties and Aboriginal Title

In *Tsilhqot'in*, the Court issued a declaration of Aboriginal title to 1,750 sq km of land. The geographic scope of the declaration is impressive and became a focal point at engagement meetings. For Aboriginal groups not involved in modern treaty-making, the declaration supports their assessment that a larger land base can be gained through Aboriginal title litigation than modern treaty negotiations. Aboriginal groups negotiating treaties contend that existing Crown mandates are now inadequate and no longer meet community expectations about what should be included in a treaty.

In many respects these perspectives are not conclusive. The *Tsilhqot'in* declaration is fact and site specific and reflects an assessment of archaeological, historical, and oral evidence supporting the plaintiffs' prior use and occupation of the land. It is also notable that the declaration represents 40% of the area claimed at trial and approximately five percent of what the Tsilhqot'in regard as their traditional territory.

Land is but one component of the benefits negotiated in a treaty. The 1,992 sq km of Nisga'a treaty settlement land is subject to the jurisdiction and law making powers of the Nisga'a Lisims government. The Nisga'a lands have fee simple attributes, meaning they can be sold, leveraged, or developed in the future. The lands can also be protected under the Nisga'a Constitution.

The attributes of Aboriginal title land are different. Aboriginal title land may only be alienated to the Crown and cannot be used in a way that would substantially deprive future generations of the benefits of the land.

Tsilhqot'in left unanswered many important questions including the procedures to be followed by Aboriginal title holders to authorize developments on Aboriginal title land. Moreover, Aboriginal title does not come with a declaration of Aboriginal self-government. While the Tsilhqot'in Nation has formed a "national government", its legal status is unclear and day-to-day governance is conducted at the *Indian Act* band level. This is not the case for the Nisga'a Lisims government whose powers and jurisdiction are expressly set out in a constitutionally protected treaty.

Treaties are most likely to succeed where there is a strong "post-treaty" community vision as well as a sustainable economy and a population that is able to support self-governance. These attributes are not common to all Aboriginal communities. Modern treaties remain relevant for Aboriginal groups that are seeking a comprehensive settlement and are prepared to reconcile their pre-existing rights through negotiations.

RECOMMENDATION

1. Canada should continue to negotiate comprehensive land claims but barriers and inefficiencies in the treaty negotiation process need to be addressed so agreements can be concluded in a timely manner.

B. Other Reconciliation Arrangements

Modern treaties are not a realistic option for many Aboriginal groups. For example, 99 of the 203 *Indian Act* bands in British Columbia are not part of the treaty negotiation process, and only three of nine Quebec Innu First Nations are negotiating a modern treaty. Reconciliation processes outside modern treaties are of interest, however, to those Aboriginal groups that are unlikely to conclude a comprehensive land claim. There are a variety of interests those communities would like to advance with Canada.

The fact the Interim Policy contemplates pursuing reconciliation with Aboriginal groups through non-treaty agreements in areas of federal jurisdiction is an important development. The Interim Policy identifies a range of topics that could be addressed this way, including fisheries and marine issues, offshore development, and tripartite arrangements with provinces and territories that address strategic interests involving land and resources.[80]

The Interim Policy also proposes incremental treaty arrangements that could be concluded during the course of modern treaty negotiations to promote cooperative relations, build capacity for modern treaty implementation, and provide predictability and clarity in relation to land and resource management.[81]

Aboriginal groups, provincial and territorial governments, and industry have responded positively to these initiatives.

Other Potential Reconciliation Arrangements

Several Aboriginal groups identified their interest in reconciliation arrangements, including:

- the St. Mary's Indian Band in New Brunswick is interested in modernizing its relationships with Canada and New Brunswick by focussing on non-treaty agreements in areas such as natural resources (including fish);
- the Tsilhqot'in National Government is interested in negotiating non-treaty agreements with Canada and British Columbia in the areas of governance, land use planning, education, health, child and family services, and employment training;
- some Aboriginal groups north of 60 want to enter into interim arrangements for resource revenue sharing in advance of concluding a modern treaty;
- the Musqueam Indian Band is interested in negotiating a bilateral fisheries agreement potentially leading to discussions about self-government;
- Métis organizations are interested in both self-government and non-treaty agreements;
- Aboriginal groups and provincial representatives in Nova Scotia want to advance reconciliation interests through the modernization of historic treaty rights; and
- the K'omoks First Nation is seeking a commitment from DFO to support its geoduck aquaculture initiative that relates to its aquaculture interim measures agreement with British Columbia.

There are options outside the treaty process that enable Aboriginal groups to influence land and resource decisions and benefit from developments. Agreements between Aboriginal communities and industry recognize the existence of unextinguished Aboriginal rights and title, and provide a range of financial and other benefits. Impact and benefit agreements are completed relatively quickly compared to treaties and provide a level of certainty for project proponents. From industry's perspective, Canada needs to proactively identify and engage strategically located Aboriginal groups about project development both within and outside formal environmental assessment processes.

80 Interim Policy, at p. 17.
81 Interim Policy, at p. 12.

In 2006, the auditor general of Canada noted that agreements between Aboriginal groups and project proponents offered benefits that meet or exceed what is available through treaty negotiations, but that those agreements are short term and of limited scope compared to treaties.[82] Although that may be true, industry is not prepared to stand by indefinitely for treaty-making to run its course. Furthermore, many Aboriginal communities whose interests are affected by proposed developments are not currently involved in treaty negotiations. Those that are do not consider treaty negotiations to be incompatible with opportunities available through resource development projects.

The emphasis in the Interim Policy on reconciliation processes outside of modern treaties complements the engagement between Aboriginal groups and industry. There is a strong entrepreneurial culture in many Aboriginal communities. Economic development creates jobs, provides joint venture opportunities for Aboriginal businesses, and builds capacity within a community. Success encourages others in the same region to pursue opportunities. Recent non-treaty initiatives by Canada, including opening a major projects management office in Vancouver, are important. Natural Resources Canada is providing a strong federal presence in Alberta and British Columbia by coordinating engagements between Aboriginal groups, project proponents, and the Crown in the development of pipelines, liquefied natural gas terminals, and related infrastructure. As well, Parks Canada has entered into several agreements with Aboriginal groups that have included shared decision-making and consultation frameworks for park lands and resources.[83] Other recent collaborative initiatives between Canada and Aboriginal groups include Canada's investment in the restoration of key fish habitats in the Musqueam Creek watershed and lower Fraser River tidal marsh.[84]

Also significant are tripartite arrangements with Aboriginal groups and provinces and territories. The Nova Scotia Mi'kmaq education agreement was completed in 1997 between 13 Nova Scotia First Nations, Canada, and the province of Nova Scotia to provide First Nations with jurisdiction over education on reserve and management of AANDC's post-secondary programs. This initiative has been considered a success by all parties. Similarly, Canada entered into a consultation process agreement with the Algonquins of Ontario and the province of Ontario in 2009 as an interim measure before the completion of treaty negotiations.

Federal departments also undertake specific non-treaty initiatives that address Aboriginal interests to help manage risks associated with section 35(1) rights. For example, Fisheries and Oceans Canada ("DFO") is party to approximately 135 annual Aboriginal fisheries strategy agreements with about 200 Aboriginal groups, aimed primarily at securing Aboriginal allocations of fish for food, social, and ceremonial purposes and ensuring the participation of Aboriginal groups in managing their food, social, and ceremonial fisheries is supported.

DFO has also entered into eight capacity development agreements and 27 collaborative management agreements under its Aboriginal aquatic resources and ocean management program to help Aboriginal groups participate in advisory and decision-making processes, and undertook the *Marshall* response initiative in the Maritimes.[85]

Furthermore, *Indian Act* bands can pursue reconciliation initiatives outside of modern treaties through sectoral federal legislation. Canada has enacted legislation that enables bands to assume greater control over lands, resources, and governance on reserve. These initiatives are designed to build capacity, expertise, and accountability. They also prepare bands for expanded jurisdictions and responsibilities if and when they choose to conclude a modern treaty or other reconciliation arrangement. They represent an important component of Canada's reconciliation framework.

82 2006 Auditor General of Canada Report, at pp. 16–17.

83 For example, the Gwaii Haanas Agreement with the Haida Nation (1993); the Gulf Island National Parks Reserve Agreements with several First Nations (2004, 2006); and an interim arrangement with the Mi'kmaq of Nova Scotia for park access (2012, 2014).

84 Natural Resource Canada, News Release, "Minister Rickford Announces New Aboriginal Partnership Projects in British Columbia" (23 January 2015), online: http://news.gc.ca/web/article-en.do;jsessionid=7d55c8ff6dbbb2fb7face1337bb8be5e9d2dcd2efe7d54bb27a757e3e7c1faa.e38RbhaLb3qNe38Nb3vo?crtr.sjpD=&crtr.mnthndVI=9&mthd=advSrch&crtr.dptiD=6683&nid=924919&crtr.lc1D=&crtr.tp1D=1&crtr.yrStrtVI=2014&crtr.kw=&crtr.dyStrtVI=1&crtr.audID=&crtr.mnthStrtVI=1&crtr.page=1&crtr.yrndVI=2020&crtr.dyndVI=4.

85 The $600 million *Marshall* response initiative was developed in response to the Supreme Court of Canada's decision in *Marshall*. It began in 2000 and ended in 2007.

Sectoral Legislation Initiatives

Canada has worked with First Nations to develop sector-specific legislation that supplements or replaces parts of the *Indian Act* to enable bands to assume greater control over land, resources, and governance on reserve. These developments were driven largely by First Nations themselves. In 1991, First Nations representatives approached AANDC with a proposal to allow bands to opt out of the *Indian Act* provisions dealing with land and resources on reserve and to develop their own land codes. Today, 94 First Nations either operate under or have developed their own land codes through the *First Nations Land Management Act*, S.C. 1999, c. 24. Other Aboriginal-led initiatives about land, resources, and finance include the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53, *First Nations Fiscal Management Act*, S.C. 2005, c. 9, the *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c. 48, and the *First Nations Goods and Services Tax Act*, S.C. 2003, c. 15.

Canada's interest in exploring agreements and constructive arrangements with Aboriginal groups is consistent with the way provincial and territorial governments approach reconciliation outside of modern treaties. These arrangements are attractive because they are more affordable than a full comprehensive claim, can be negotiated relatively quickly, and can be used to advance economic development. Some provinces and territories expressed interest in Canada participating in tripartite arrangements, even if the subject matters fall primarily within provincial jurisdiction such as land-use planning agreements.

British Columbia's Approach

The 1980s and 1990s were a period of conflict, confrontation, and direct action in relation to resource development in British Columbia. The provincial government responded to developments in the Crown's legal duty to consult in a way that has strengthened its relationship with First Nations. In 2005, the British Columbia government entered into the *Transformative Change Accord* with the Union of BC Indian Chiefs, the First Nations Summit, and the BC Assembly of First Nations. The objectives of this initiative are ongoing. They include closing the social and economic gaps between Aboriginals and other British Columbians, and reconciling Aboriginal rights through cooperative relationships.

The government of British Columbia has developed bilateral non-treaty arrangements with First Nations that address section 35 rights and respond to a range of resource development issues through reconciliation protocols, strategic engagement agreements, forestry consultation and revenue sharing agreements, economic and community development agreements, resource management agreements, and project specific accommodation agreements. These initiatives complement impact and benefit agreements between industry and First Nations that provide jobs, business opportunities, and on-going payments during the life of a project.

The provincial government also negotiates agreements with First Nations to share mineral tax revenue on new mines and major mine expansions. It has initiated a comprehensive plan for the development of natural gas pipelines and liquefied natural gas plants that includes negotiating benefits agreements with First Nations on proposed pipeline routes as well as funding Aboriginal skills training and environmental stewardship projects.

Crown-Aboriginal relations and the environment for economic development have improved as a result of the provincial government's purposeful approach. Responsibility for relationships with Aboriginal communities is not the function of a single government department but rather is shared across ministries with oversight from the premier's office. Fundamental differences between the province and First Nations still materialize but with less rancour than in the past.

Canada has been reluctant to address reconciliation outside the comprehensive land claims policy. Canada's interest in doing so is seen as a positive development. Canada needs to clearly articulate the spectrum of potential reconciliation arrangements and create clear processes for supporting those tools including funding Aboriginal participation. Success will also require an open and collaborative approach and a willingness to respond meaningfully to the anticipated interest by Aboriginal groups and the arrangements they propose. Instead of waiting for proposals to come forward, Canada should actively pursue reconciliation arrangements that may further Canada's strategic interests.

Crown-Aboriginal reconciliation can be pursued through various arrangements including:

- consultation protocols for resource development projects;
- environmental assessment processes;
- land acquisition and disposition;
- fisheries habitat and enhancement;
- protection of species at risk;
- marine safety;
- pipeline monitoring activities;
- transportation of dangerous goods;
- cumulative impacts of developments;
- self-government arrangements;
- education;
- health; and
- employment and training.

RECONCILING MÉTIS RIGHTS USING OTHER RECONCILIATION ARRANGEMENTS

The Métis are a distinct Aboriginal people. They are descendants of those born of unions between First Nations women and European traders and explorers, beginning in the 17th century. Métis populations developed their own distinctive culture which incorporated aspects of both their indigenous and European roots. In the 18th and 19th centuries Métis began to identify as collectives and form settlements, mainly in present day Manitoba, Saskatchewan, and Alberta and also in parts of Ontario.

As the Supreme Court of Canada recently noted, "[a]lthough widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, the law remained blind to the unique history of the Métis and their unique needs."[86] In the 1982 constitutional talks, the Métis successfully pursued recognition of their status and rights as a distinct Aboriginal people. As a result, section 35(2) of the *Constitution Act, 1982* identifies the Métis as one of Canada's three Aboriginal peoples.

86 *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, at para. 7 [*Cunningham*]. For example, to illustrate, unlike the *Indian Act*, federal legislation has not defined the term Métis.

Despite succeeding more than 30 years ago in their quest for constitutional recognition, the Métis regard Canada as having failed to accept their status as an Aboriginal group with constitutionally protected rights. The 1986 Policy, like its predecessors, is silent on Métis rights, and the Interim Policy does not specifically address their interests either. Any rights recognition obtained by the Métis has been in the courts, and there have been several successes in recent years.[87]

Métis representatives reacted positively to this policy review because they hope a new policy will finally address their rights and interests to lands, resources, and governance. They want to negotiate settlements of their outstanding claims against the Crown for "broken promises and unfulfilled obligations". They are also seeking a flexible approach to self-government to address their unique governance aspirations.

Canada must do more in its relationship with the Métis to ensure their section 35 rights are appropriately recognized and can be meaningfully exercised. As the Standing Senate Committee on Aboriginal Peoples observed in 2013, "reconciliation [with Métis groups] is necessary in order to provide a solid foundation for present and future generations of Métis in Canada".[88] Although it has been noted that "Métis identity is a complex, multifaceted concept",[89] this should not prevent Canada from moving forward. The Métis Nation Protocol completed by Canada and the Métis National Council in 2008 (and subsequently renewed in 2013) provides a starting point for the continued development of this relationship.[90] Bilateral agreements between Métis groups and some provinces are examples of how Métis section 35(1) rights can be reconciled.[91]

RECOMMENDATIONS

1. Canada should identify the spectrum of reconciliation arrangements, apart from modern treaties, it is willing to pursue with Aboriginal groups, and it should be receptive to proposals from Aboriginal groups and provincial or territorial governments.

2. Canada should initiate discussions about potential reconciliation arrangements on a bilateral or tripartite basis in areas of strategic federal interest.

3. Federal mandating and approval processes for reconciliation arrangements should be structured to facilitate timely decision making.

4. Canada should continue its discussions with the Tsilhqot'in National Government about a range of bilateral or tripartite agreements outside the BC treaty process.

5. Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests.

6. Canada should establish a framework for negotiations with the Manitoba Métis Federation to respond to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, 2013 SCC 14.

87 See, for example, *R. v. Powley*, [2003] 2 S.C.R. 207; *R. v. Goodon*, 2008 MBPC 59; *Cunningham*; and *Manitoba Métis Federation*.

88 Canada, Senate, Standing Senate Committee on Aboriginal Peoples, *"The People Who Own Themselves": Recognition of Métis Identity in Canada*, 41st Parl, 1st Sess (June 2013) (Chair: Hon. Vernon White), at p. 54 [*Recognition of Métis Identity*].

89 *Recognition of Métis Identity*, at p. 17.

90 The Métis Nation Protocol sets out the various areas that the parties will further examine, including Métis Nation governance and institutions, economic development, and Métis Aboriginal rights. The protocol also sets out that there will be regular meetings between different levels of representatives of the parties and that, where provinces agree, Canada will agree to participate in multilateral discussions with provincial governments and the national and provincial Métis organizations.

91 See, e.g., the 2012 harvesting agreement entered into between the government of Manitoba and the Manitoba Métis Federation and the 2004 harvesting agreement between the government of Ontario and the Métis Nation of Ontario.

C. A New Rights-Informed Approach

Canada does not recognize the existence of an Aboriginal group's specific section 35(1) rights at the outset of modern treaty negotiations. In British Columbia, negotiations are rights-neutral: a First Nation is not required to demonstrate it is the proper rights-holding collective. In the rest of the country, Canada performs a preliminary rights-based assessment at the outset of negotiations to determine whether the group is a proper rights-holding collective. In all cases, Canada's negotiation mandates are not informed by an Aboriginal group's pre-existing Aboriginal rights.

Canada is prepared to make a general recognition that a treaty group has Aboriginal rights, including title, in the preamble to a treaty but is not prepared to provide the specific recognition sought by some Aboriginal groups.

Many Aboriginal groups want the Crown to recognize their Aboriginal rights at the outset of negotiations. They believe that 25 years of Aboriginal rights and title litigation have consistently confirmed their perspective about recognition. Aboriginal groups want the scope, content, and geographic extent and location of their pre-existing Aboriginal rights to be expressly reflected in a treaty.

Post-*Tsilhqot'in*, Aboriginal groups anticipate that a rights-based approach will result in a larger land quantum, more influence over land and resource use decisions in their traditional territories, and a greater share of resource revenues.

Previous reviews of the comprehensive land claims policy, including the Coolican, Hamilton, and Royal Commission Reports, have emphasized the importance of negotiations being grounded in the recognition of pre-existing Aboriginal rights and not their surrender or extinguishment.

Canada's attempts to respond to calls for recognition in the past include the following:

- developing a tripartite statement on Crown and Aboriginal title in British Columbia following the *Delgamuukw* decision;
- including language in the preamble of treaties acknowledging the existence of Aboriginal rights generally;
- since 2010, negotiating the inclusion of language in the preamble of agreements-in-principle acknowledging that a specific group is part of a historical collective that has pre-existing rights, including title; and
- most recently, adopting recognition and reconciliation principles in the Interim Policy.

A purely rights-based approach to treaty negotiations would require the parties' agreement about the nature, scope, and extent of the claimed rights based on tests articulated by the Supreme Court of Canada. It would involve a process quite different from current negotiations and would require the collective to provide evidence to support the claimed rights as well as the Crown's agreement based on its own assessment. This may not be the most efficient way to address reconciliation because an evidence-based approach is time-consuming, can lead to internal conflict within a collective and disagreements between collectives, encourages litigation, and is contrary to the give and take of negotiations that the Supreme Court of Canada has been advocating.

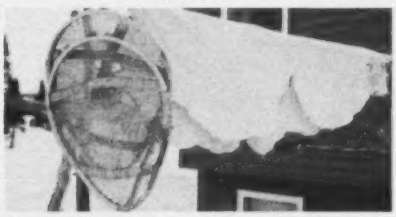
There is a middle ground. Where an Aboriginal group wants a modern treaty to reflect its pre-existing Aboriginal rights, including title, Canada could develop a new model that would include:

- a determination whether a group is a proper rights-holding collective;
- a preliminary assessment of the group's claimed Aboriginal rights;
- where satisfied, a general recognition at the commencement of negotiations that the group has specific pre-existing Aboriginal rights and that the purpose of negotiations is to reconcile and affirm those rights; and
- the Crown's negotiation position being informed by that assessment.

As with the current treaty process, these negotiations would be without prejudice. Further, it is critical for provincial and territorial governments to agree to this model.

RECOMMENDATION

1. Canada should develop an alternative approach for modern treaty negotiations, one informed by the recognition of existing Aboriginal rights, including title, in areas where Aboriginal title can be conclusively demonstrated.



SECTION 5 — Reforming Modern Treaty-Making

SECTION 5 — Reforming Modern Treaty-Making

Modern treaty-making has unfolded at a languorous pace. Since 1973, 122 claims have been accepted for negotiation but only 26 final agreements have been completed. Today, 75 claims are at various stages of negotiation. More than 80 per cent of those tables have been in the treaty process for longer than ten years, some for more than two decades.[92] At the current pace, treaty-making may continue for the rest of this century.[93]

How long should it take to negotiate a modern treaty? There is no defined or measurable standard but the current process takes far longer than anticipated.[94] The reasons are multifactorial. Election cycles, changes in government, and shifting political priorities are unavoidable events that prolong negotiations. In British Columbia, many smaller First Nations entered negotiations on their own and not as part of larger aggregations as initially anticipated. Shared territories and overlapping claims add complexity to the process and discharging the duty to consult has become an onerous and time consuming activity. Also, fundamentally different views about the purpose of negotiations and the finality or permanence of treaties have been barriers to progress.

Process inefficiencies contribute as well to the sluggish pace of negotiations. In the absence of strong advocates for treaties and determined leadership to guide negotiations, the parties have become accepting of the process and complacent about results. All parties must be ready to confront hard realities. The current process has taken the parties on an unnecessarily long journey. There is a risk that treaty-making is being overtaken by legal, economic, and political developments.

I received no shortage of advice about Canada's approach to treaty-making and what needs to change. Those observations, which are summarized below, need to be considered in the proper context. Canada is one of three parties at negotiation tables. Because of the scope of my mandate, the recommendations in this report relate only to the steps Canada can take to address systemic impediments. Some of the recommendations necessarily involve the participation and cooperation of other parties. It would be useful for those parties to also assess their respective objectives and consider modifications and changes in their approach as may be appropriate.

92 See http://www.aadnc-aandc.gc.ca/eng/1406824128903/1406824211834#key.

93 Canada approved one final agreement in each of 2009 and 2010, one agreement-in-principle in each of 2011 and 2012, one final agreement in 2013, and two final agreements and one agreement-in-principle in 2014.

94 The 1986 Policy acknowledged that serious concern had been expressed about the rate of progress in negotiations. When negotiations began under the BC treaty process in 1993, there was an expectation that up to 30 treaties would be negotiated before the end of the decade. It would take 15 years to complete the first final agreement under that process. The May 2002 report of the tripartite working group, *Improving the Treaty Process*, concluded that the BC treaty process was expensive and took too long to achieve results. Nine years later, the chief commissioner admonished all parties for their lack of urgency in treaty negotiations.

A. Institutional Barriers and Process Inefficiencies

THE CURRENT PROCESS

AANDC represents Canada's interests at all tables.[95] However, because of the comprehensive nature of claims, the interests of multiple departments and agencies are affected by treaty negotiations. The resulting problems are longstanding.

> A common complaint is that the federal government's inability to agree upon its own position has caused serious delays in negotiations. Various interdepartmental co-ordinating committees involving ministers, deputy ministers, and other officials have been attempted as means of ensuring co-ordination and approval of negotiating positions by all relevant departments. Although some of these attempts at co-ordination have had merit, the committees have been unable to overcome the resistance from those departments unwilling to modify their general policies to secure effective agreements.
>
> *Task Force to Review Comprehensive Claims Policy, Living Treaties: Lasting Agreements — Report of the Task Force to Review Comprehensive Claims Policy*, p. 87.

Furthermore, Canada's claims procedures are cumbersome, requiring Cabinet approval at several stages in negotiations. It is not unusual for each approval to take two years or longer. Today, six treaty tables are waiting for Canada to either initial or sign their respective agreements-in-principle. Three of the agreements-in-principle have been in the queue for more than two years.

Many Aboriginal groups feel that treaty negotiations are not aspirational, nation-building initiatives but have become another government program mired in bureaucratic intransigence and inertia. Several examples were provided to highlight the poor coordination between federal departments and agencies. Because of slow federal decision making, time-sensitive opportunities are frequently missed. Many noted that Canada's negotiators have limited authority to agree to anything unless previously approved within the federal system. As well, Canada's negotiators do not have authority to make commitments on behalf of all federal departments. Aboriginal representatives also observed that momentum is undermined by frequent turnovers in federal and provincial negotiators.

Canada is considered an uncreative negotiating partner. Many Aboriginal groups described a cookie cutter, take it or leave it approach instead of interest-based, good faith negotiations. Aboriginal, provincial, and territorial representatives also noted a lack of sensitivity on the part of Canada to regional issues particularly in the north and Atlantic Canada. There were also complaints that dialogue at tables is constrained because federal mandates are narrowly construed. For example, I was told that Canada's negotiations with the Mi'kmaq and the Nova Scotia government have not been productive because those groups want to discuss the modernization of historic peace and friendship treaties while Canada is proposing to negotiate a modern treaty. There is a similar level of dissonance between Canada and the Kwakiutl First Nation in British Columbia, which claims rights as a Douglas treaty beneficiary.

Some Aboriginal representatives indicated that if Canada wants to "break the log jam" in negotiations it should revisit elements of its negotiation mandate that are the most unpalatable to Aboriginal groups, including own source revenue, certainty, the constitutional status of treaty settlement lands, fisheries, and taxation.

95 Other departments are the lead on certain issues. For example, the Department of Finance leads in the negotiation of the taxation chapter and related agreements.

Canada is not the only party responsible for delay. Many Aboriginal groups are hesitant to close negotiations because they are apprehensive about the permanence and finality of modern treaties. Understandably, Aboriginal groups are reluctant to lock-in treaty rights when there is a prospect that other rights not contemplated during negotiations may subsequently be defined by the courts. The fact the treaty process provides a constant source of funding and employment in Aboriginal communities can also serve as a disincentive to conclude negotiations. Finally, many Aboriginal groups are simply not ready to take on the responsibilities of a treaty despite spending a decade or longer in negotiations.

Capacity is an issue for Canada in a different sense. Given the current inventory of 75 treaty tables, Canada is often unable to promptly respond to issues when they arise, obtain approvals, or make decisions. The Crown is also responsible for representing the full range of interests of non-Aboriginal Canadians at negotiating tables. Frequently, there are competing interests to the land and resources under negotiation. The west coast fishery has been particularly challenging to manage. Public concern about proposed treaties has limited what the Crown is prepared to negotiate. Without political resolve to advance negotiations, delay often results.

> Further, tensions may arise between the need to sign treaties and the government's responsibility to consider other interests. For example, [AANDC] must negotiate the fisheries provisions in treaties with First Nations, who can have strongly held positions on what they are prepared to accept. [DFO] must consider the interests of a number of stakeholders not involved in the treaty process (such as commercial and recreational fishers) with the objective of signing treaties. [DFO] believes that it must do this while maintaining ministerial discretion to manage and protect fish and fish habitat. [AANDC] and [DFO] are required to reconcile these broader government objectives before the fisheries provisions of a treaty can be finalized.
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> *2006 Report of the Auditor General of Canada to the House of Commons, Chapter 7 — Federal Participation in the British Columbia Treaty Process*, p. 23, para. 7.58.

It is costly to maintain negotiations that drag on year-after-year. Since 2005, AANDC's annual expenditures to participate in comprehensive land claims and self-government negotiations have averaged $22.9 million. This does not include costs incurred by other federal departments. Canada also funds Aboriginal participation through contributions and loans with repayment due once negotiations come to an end. High debt loads are a disincentive for Aboriginal groups to enter treaty negotiations and, for those already in the process, to leave because doing so will trigger repayment of their loans.

MOVING FORWARD

What can be done? A fundamental problem with the current process is the formidable challenge of coordinating the range of federal interests at treaty tables. Treaty-making is not a sufficient priority across the government with the result that many departments and agencies are unresponsive and seldom called to account.

Difficulties caused by the lack of clear direction for federal departments and agencies to collaboratively advance treaty-making are longstanding. In 1985, the Coolican task force observed that federal departments and agencies were unwilling to modify their general approach to conclude treaties — conflicting departmental positions were described as "immovable barriers to progress in negotiations".[96] The fact these problems persist three decades later demonstrates the absence of a strong commitment by the entire federal government to treaty-making. Without more purposeful leadership, Canada's approach is bound to produce the same disappointing outcomes.

Canada's approval process is a significant barrier to progress.[97] Schedule 5-1 illustrates the various steps during negotiations from the filing of a claim to the implementation of a final agreement. Check-ins with up to 40 federal departments and agencies are required throughout the process. Negotiations are also subject to review by an interdepartmental senior oversight committee (the "Federal Steering Committee").[98] Productive negotiations are effectively suspended when Cabinet approvals are required. Under the current process, the business of treaty-making occupies a disproportionate amount of Cabinet's time. One way to accelerate progress is to dispense with the need for formal Cabinet approval of framework agreements and agreements-in-principle. The Minister of AANDC could consider and approve those agreements on advice from the Federal Steering Committee. Cabinet, of course, would remain informed on an ongoing basis of the status of all negotiations as well as other section 35(1) initiatives.

There are other ways to address institutional inertia, including the establishment of federal service standards to prescribe timelines for departments and agencies to review and respond to issues and proposals made by the negotiating parties.

At engagement meetings, some Aboriginal and provincial representatives discussed the utility of chief federal negotiators representing Canada's interests at treaty tables. At some tables, Canada retains chief federal negotiators who are independent from the federal public service. Success in that role is dependent on several factors. Chief federal negotiators should have experience in negotiations, knowledge of Aboriginal issues, familiarity with the operations of government, and flexible schedules. They need Canada's confidence as well as clear instructions and access to the Minister and senior officials to discuss and resolve impediments to progress. Aboriginal and provincial representatives are of the view that chief federal negotiators do not currently have sufficient instructions or access to be effective.

96 *Living Treaties: Lasting Agreements*, at p. 87.

97 The auditor general has noted that treaty negotiations are "one of the most controlled and inflexible processes in the federal government." 2006 Auditor General of Canada Report, at p. 23, para. 7.60.

98 The federal steering committee on self-government and comprehensive claims is composed of assistant deputy ministers and is responsible for coordinate Canada's participation in treaty and self-government negotiations. It reviews and provides advice to Ministers on negotiating mandates, the negotiating process, framework agreements, agreements-in-principle and final agreements. The committee provides a regular ongoing review, at a senior level, of treaty priorities, negotiating strategies, and operational and policy issues that relate to negotiations, while maintaining an overview of activities across the federal government related to negotiations. Finally, the committee provides policy elaboration and advice, monitors progress and facilitates the participation of all federal departments and agencies as required in negotiation processes.

High level leadership and a culture shift within the federal system are required for Canada's approach to improve. Aboriginal organizations have proposed that responsibility for treaty-making be transferred from AANDC to a separate department or agency.[99] Doing so would undoubtedly send a strong message. I urge Canada to carefully consider the merits of this proposal.

One of the overlooked recommendations in the BC Task Force Report is the need for education and information programs to advance public understanding and interest in treaty-making.[100] The British Columbia Treaty Commission publishes topical and informative annual reports but the parties could also jointly undertake initiatives to increase public awareness and knowledge in British Columbia about the object and purpose of modern treaties. The dissemination of accurate information about negotiations serves to address misconceptions about and builds support for treaties. Canada should take the initiative and encourage its partners in all regions to participate in public education and information programs.

IMPROVING PRODUCTIVITY

Productivity at treaty tables needs to improve. Too much time is spent parsing chapter language and debating provisions that are well settled by precedent and that the Crown is simply not prepared to change. Efficiencies would be realized if the Crown were to be clear about what it can and cannot negotiate. Canada should consider enacting opt-in legislation establishing the core elements of a modern treaty and have the more detailed, operational elements negotiated in non-constitutionally protected side agreements. Alternatively, Canada could develop a standardized umbrella agreement identifying provisions that are, and are not, open for negotiation. Adopting such approaches would enable Aboriginal groups to decide if it is in their interest to pursue a modern treaty or negotiate discrete topics in incremental treaty or non-treaty arrangements instead.

Aboriginal groups may perceive treaty legislation or an umbrella agreement as confirmation of Canada's inflexible and immutable approach. I believe, though, that standardizing aspects of a treaty would enable parties to focus on the unique and important elements of an agreement.

This of course presumes that each of the 75 remaining tables harbours a vision or ambition about advancing their community's interests through a comprehensive land claims agreement. In any event, all parties including Canada need to act reasonably and demonstrate a willingness to consider proposals having regard to the other parties' legitimate interests.

Another option is a "thin treaty" approach whereby the constitutionally protected agreement would only set out the core operating components of the treaty, including jurisdiction, governance structures, and rights and obligations, but the administrative or technical aspects would be addressed in time-limited, renewable side agreements. This approach could speed up the conclusion of negotiations of the core treaty components and also provide additional flexibility to adapt to changing circumstances.

99 The First Nations Summit proposed that treaty-making functions be placed under the responsibility of the Prime Minister's Office (see First Nations Summit, *Treaty Negotiations & Canada's Comprehensive Claims Policy, A First Nations Summit Position Paper* (02 May 2013), at pp. 10–11 [Summit Paper]). The Coolican task force reached a different conclusion, recommending that responsibility for treaties remain with AANDC where Aboriginal issues are an important priority: *Living Treaties: Lasting Agreements*, at p. 88.

100 BC Task Force Report, at p. 24.

EVALUATING THE CLAIMS INVENTORY

It is time for candid discussions at each of the 75 tables. Not all appear to be heading to successful conclusions. A relatively small number of tables are near or ready to close negotiations. Canada needs to assess and prioritize where to invest its time and resources.

Seven claims (four in British Columbia and one in each of Newfoundland and Labrador, Quebec, and the Northwest Territories) are now in final agreement negotiations. A sense of urgency and purpose is needed to push those tables over the line. Resources need to be committed to expedite negotiations and facilitate approvals. Work plans identifying milestones, shared territories and overlapping claims, and cost are a necessary first step. It would be useful as part of a closing regimen to appoint a neutral third party to guide negotiations by setting agendas, planning meetings, clarifying issues, focussing discussions, establishing dates and timelines, monitoring and reviewing progress, engaging in problem solving, and resolving conflicts.[101] Financial incentives could be offered to keep the parties on track and remedial measures implemented when milestones are missed. Difficult choices need to be made and unresolved issues tackled head-on to accelerate closings.

Of the remaining 68 claims, Canada needs to complete its approval processes for the six agreements-in-principle (four from British Columbia and one from each of Ontario and the Northwest Territories) as soon as practicable. Collaborative work-planning should be undertaken now for those tables to commence final agreement negotiations, including establishing timelines and projecting costs.

Thirty-three tables in various regions are negotiating agreements-in-principle. It is critical that realistic assessments be undertaken at each table of the readiness and interest of the parties to proceed with treaty or pursue other options. For those groups that wish to remain in the treaty process, the Interim Policy offers a range of incremental treaty arrangements to develop capacity and build momentum. These opportunities should be explored. As well, the parties should consider whether economies of scale and a more efficient allocation of resources could be achieved by encouraging groups to negotiate together on a regional or sector basis on specific issues, *e.g.*, fish, wildlife, governance.

I expect many groups may be hesitant or unsure about some of the technical aspects of modern treaties, including fiscal relations, own source revenue, certainty techniques, taxation powers and exemptions, and the constitutional status of treaty settlement lands. Canada should encourage twinning relationships between treaty tables and the 26 modern treaty communities with the objective of facilitating discussion and advancing knowledge and understanding about the technical aspects of treaties. The 26 modern treaty communities may be the most knowledgeable and objective authorities about the content and operation of comprehensive land claims agreements.

Of the remaining tables, 17 in British Columbia are not actively involved in negotiations under the BC treaty process. Exit strategies should be contemplated and non-treaty initiatives explored for each of those groups.

101 The role I am proposing is similar to that of a case management judge who assists parties in the civil litigation process.

PROMOTING ACCOUNTABILITY

There is a critical need for more accountability in modern treaty negotiations. The appointment of a national treaty commissioner to oversee the process and expedite the settlement of claims has been contemplated since the 1950s. In 1985, the Coolican task force recommended the establishment of a commission to monitor and make recommendations to improve the progress of negotiations and report annually to Parliament.[102]

I do not believe imposing another structure on what has become an over managed, expensive, and inefficient process would be particularly useful at this point. The British Columbia Treaty Commission already exists in British Columbia. Its ambiguous mandate as the "keeper of the process" does not give it the teeth to meaningfully supervise negotiations. Furthermore, at this stage it would be impractical to re-establish treaty negotiations under a newly minted commission or tribunal.

There are constructive ways to improve accountability through existing processes. In 2006, the auditor general of Canada and the auditor general of British Columbia performed concurrent audits of the BC treaty process. Their reports provide an illuminating account of the time, resources, and results during the first 14 years of treaty-making in British Columbia. An updated audit before the end of this decade would likely yield useful insights. The auditor general of Canada has the discretion to conduct a further review in future or may do so at the request of the governor in council.[103] Similar audits should be undertaken in other regions where comprehensive land claims are being negotiated.

The House of Commons Standing Committee on Aboriginal Affairs and Northern Development (the "Committee") may also have a role by investigating and reporting on a range of issues relating to treaties. The Committee's mandate includes all areas covered by AANDC as well as the agencies that report to the Minister including the British Columbia Treaty Commission. The Committee can pursue self-initiated studies about any aspect of AANDC's management and operations as well as any programs or policy areas administered by AANDC.

Ultimately, accountability is best assessed by objective outcomes. There has been reluctance, though, to expose the lack of progress and cost incurred at specific treaty tables. The tabling by the Minister of an annual report to Parliament detailing the activities, expenditures, and outcomes of negotiations at each table would be an effective step to strengthen accountability. This would entail collaborative annual assessments at each table to assess the stage of negotiations and time spent in the process as well as the community's vision, progress on substantive mandate issues, and the level of debt incurred. Annual reports should also identify milestones, objectives, and impediments. Updating the assessments annually to gauge progress and tabling those assessments in Parliament would provide a level of public accountability that is currently lacking.

FEDERAL — PROVINCIAL / TERRITORIAL COLLABORATION

Provinces and territories have expressed the need for greater coordination and information sharing about treaty and self-government issues. In most cases, federal, provincial, and territorial negotiation mandates are developed in isolation, sometimes resulting in incompatible negotiation positions.

Greater coordination and information sharing among governments would ensure mandates better reflect the interests of all levels of government, take advantage of best practices, and reduce delays caused by inconsistent mandates.

102 *Living Treaties: Lasting Agreements*, at pp. 79–82.
103 *Auditor General Act*, R.S.C., 1985, c. A-7, sections 9 and 11.

A precedent exists in a federal-provincial-territorial working group that coordinates work related to the Crown's consultation obligations.[104] Canada should consider whether there is utility in expanding the mandate of this working group, or in creating a new working group, as a federal-provincial-territorial forum for section 35(1) related activities.

RECOMMENDATIONS

1. The Minister of Aboriginal Affairs and Northern Development should be given the discretion to approve all non-binding framework agreements and agreements-in-principle upon the recommendation of the federal steering committee.

2. Canada should focus resources on productive negotiating tables, acknowledge where it is unable to make progress with other groups, and identify groups whose interests would be better suited to other reconciliation arrangements.

3. In order to be more responsive, Canada should:

   a. impose internal timelines to obtain necessary approvals and respond to proposals from negotiating tables;

   b. require federal departments to coordinate their resources in ways that address the needs of productive negotiating tables; and

   c. ensure the new reconciliation framework is made a priority across departments.

4. Canada should consider options to accelerate the conclusion of modern treaties, including opt-in legislative approaches, the negotiation of regional umbrella agreements, the identification of mandatory treaty provisions, and the development of "thin treaties".

5. Canada should work with its negotiation partners to develop the necessary accountability mechanisms to be able to assess progress in negotiations.

6. Canada should promote greater accountability through a range of options which may include auditor general reviews, standing committee reports, or annual reports by the Minister of Aboriginal Affairs and Northern Development to Parliament on the status of negotiations at tables.

7. Canada should consider the use of an independent chair to impose accountability and supervise progress at final agreement tables.

8. Canada should encourage its partners to jointly undertake education and information programs about the object and purpose of modern treaties and progress at specific treaty tables.

9. Canada should establish a forum with provincial and territorial governments to share information and best practices and to facilitate coordination for reconciliation initiatives.

104 The federal/provincial/territorial working group on Aboriginal consultation and accommodation works to more effectively coordinate consultation on a national level. In particular, it supports information sharing, provides advice and recommendations, and undertakes joint policy analysis on consultation and accommodation related issues.

SCHEDULE 5-1

Modern Treaty-making Process

CANADA (NOT INCLUDING BC)

1. STATEMENT OF CLAIM ("SOC") FILED WITH CANADA
The claims process begins with the submission of an SOC and appropriate supporting materials by a claimant group to Canada. The SOC identifies the Aboriginal group, its traditional territory and supporting evidence, and a plan for addressing overlaps.

2. ACCEPTANCE OF CLAIM BY CANADA
Minister of AANDC, with the advice of the Department of Justice, decides whether or not an SOC is accepted for negotiation. The Minister must do this within 12 months of receipt of an SOC.

The Minister must be satisfied a group is mandated to negotiate. Bilateral discussions occur with respective provinces and territories about their participation in negotiations.

BC TREATY PROCESS

1. STATEMENT OF INTENT ("SOI") FILED WITH THE COMMISSION
The claims process begins when a First Nation files its SOI with the Commission to negotiate with Canada and BC. The SOI identifies the group's governing body and its traditional territory, who it represents, its negotiating mandate, and overlapping neighbouring groups.

2. READINESS TO NEGOTIATE
The Commission convenes an initial meeting of the parties within 45 days of receiving an SOI. This meeting allows the Commission and the parties to exchange information, consider the parties' readiness to negotiate, and identify issues of concern.

3. FRAMEWORK AGREEMENT
Once a claim is accepted, the Aboriginal group, Canada, and the provincial or territorial government commence discussions to determine the subject matters for negotiation. The framework agreement serves as an agenda for the agreement-in-principle ("AIP") negotiations, listing the substantive issues to be negotiated, how the parties will discuss the issues, and a work plan for reaching an AIP.

Concluded framework agreements require the approval of the federal steering committee ("FSC") and Cabinet.

Mandate to negotiate AIP also sought at this time.

Concluded framework agreements require the approval of FSC and the Minister of AANDC.

General instructions provide negotiators with parameters to negotiate AIP (short of land and cash).

4. AGREEMENT-IN-PRINCIPLE ("AIP")
This is the deal-making stage of negotiations where the parties reach agreement on the issues identified in the framework agreement and which will form the terms of the final agreement. It contains the most important points to be agreed upon, including land and cash.

In BC, FSC and Cabinet approval are sought to negotiate the land and cash components. Outside BC, FSC and Cabinet approval are sought for all elements of an AIP (see above).

Once an AIP is completed, federal approval is sought through FSC and Cabinet processes.

The AIP also requires approval by the Aboriginal group and the provincial or territorial government.

5. FINAL AGREEMENT AND RATIFICATION
A final agreement negotiation is the last stage of negotiations during which the parties undertake to finalize a treaty. Once finalized, the parties initial the agreement and go back to their principals to ratify the agreement.

The Aboriginal group is the first of the parties to ratify the agreement. The ratification process must ensure that all members have an opportunity to review, understand, and participate in the ratification vote. Procedures for ratification must be transparent. The province or territory ratifies the agreement next. Canada ratifies the agreement last.

Authority for Canada to sign the final agreement is sought through the FSC and Cabinet processes. Following federal approval, settlement legislation is passed to give effect to the agreement.

6. IMPLEMENTATION OF THE AGREEMENT

B. BC Treaty Process

British Columbia experienced a different treaty-making history than the rest of Canada.[105] With the exception of the Douglas treaties on Vancouver Island and the extension of Treaty 8 into the northeast of the province, no other historic treaties were concluded in the province. This has resulted in a comparatively high number of unresolved Aboriginal land claims that cover most of British Columbia.

When British Columbia joined Confederation in 1871, the provincial government took the position that First Nations did not have rights to land, despite the terms of union providing provincial control over the creation of further Indian reserves. Because Canada retained responsibility for matters related to Aboriginal people under section 91(24) of the *Constitution Act, 1867*, the provincial government's perspective was that the Indian land question had been resolved.

Through the 19th and 20th centuries, many First Nations claimed that their title had not been extinguished and sought to conclude treaties with the Crown. The demand for treaties was resisted by both Canada and the government of British Columbia.

> We condemn the whole policy of the B.C. government towards the Indian tribes of this country as utterly unjust, shameful and blundering in every way. We denounce same as being the main cause of the unsatisfactory condition of Indian affairs in this country and of animosity and friction with the whites. So long as what we consider justice is withheld from us, so long will dissatisfaction and unrest exist among us, and we will continue to struggle to better ourselves. For the accomplishment of this end we and other Indian tribes of this country are now uniting and we ask the help of yourself and government in this fight for our rights. We believe it is not the desire nor policy of your government that these conditions should exist. We demand that our land question be settled, and ask that treaties be made between the government and each of our tribes, in the same manner as accomplished with the Indian tribes of the other provinces of Canada, and in the neighboring parts of the United States. We desire that every matter of importance to each tribe be a subject of treaty, so we may have a definite understanding with the government on all questions of moment between us and them.
>
> *Memorial to Sir Wilfred Laurier, Premier of the Dominion of Canada from the Chiefs of the Shuswap, Okanagan, and Couteau Tribes of British Columbia. Presented at Kamloops, British Columbia on 25 August 1910.*

While Canada indicated its willingness to negotiate modern treaties in 1973, the British Columbia government continued its opposition. The enactment of section 35 in 1982 and Aboriginal rights litigation moderated the province's position. In 1990, British Columbia agreed to participate in land claims negotiations and joined negotiations already under way with the Nisga'a Nation.[106] The British Columbia claims task force was established that year. The task force recommended that a new relationship would best be achieved through voluntary negotiations in a "made in BC" process. All of the task force recommendations were adopted by Canada, the First Nations Summit (the "Summit"), and the government of British Columbia (collectively, the "Principals").

105 The BC Task Force Report contains useful information in a section entitled "Historical Background" about the historical relationship between the Crown and Aboriginal groups in British Columbia.

106 As negotiations with the Nisga'a Nation began before the BC treaty process was implemented, they were concluded outside that process.

The BC treaty process differs from treaty negotiations elsewhere in the country in the following ways:

- the British Columbia Treaty Commission (the "Commission"), as "keeper of the process", oversees negotiations under the six stage process and administers negotiation support funding;[107]
- the process is open to all First Nations, including those claiming historic treaty rights, and First Nations decide whether to enter the process on their own or as part of an aggregation;
- there is no preliminary legal assessment of a First Nation's statement of intent prior to their participation in the process; and
- the Commission determines when parties are ready to start negotiations.

Modern treaty negotiations in British Columbia began in 1993. At the time, it was anticipated that treaty-making would be completed by 2000.

After more than 20 years of negotiations, it is clear those expectations were overly ambitious if not unrealistic. Still, important lessons have been learned. Only four treaties have been concluded under the BC treaty process.[108] Today, 53 tables representing approximately half of the *Indian Act* bands in the province are engaged in the process. Only four tables are at the stage of negotiating a final agreement. While predicting outcomes in treaty negotiations is challenging, it is improbable that each of the 53 tables will complete a final agreement. It is more likely that no more than ten tables are likely to conclude a treaty in the foreseeable future.

Judicial decisions have also brought into question the appropriateness of a non-rights based approach to negotiations, given the number of overlapping claims in the province and the Crown's consultation obligations. Geography, climate, and the reserve creation policy in British Columbia led to the creation of a comparatively large number of *Indian Act* bands with small populations. The bands are creatures of statute and in many cases are subsets of larger historical, cultural, and linguistic affiliations. The reality of numerous First Nations with small populations has presented challenges in terms of capacity to negotiate and implement treaties and in the number of negotiations in which the Crown must participate. In addition, the adoption of some task force recommendations, such as the Commission's role in determining readiness and negotiation support funding, may have had the unintended consequence of prolonging the process of negotiations. Intra-community disputes about the validity of a negotiating entity's mandate and authority to participate in treaty negotiations have also been challenging to resolve.[109]

107 The Commission's mandate is set out in the British Columbia Treaty Commission agreement which was completed in 1992 by the Principals.

108 Tsawwassen First Nation Final Agreement, Maa-nulth First Nations Final Agreement, Yale First Nation Final Agreement, and the Tla'amin Final Agreement.

109 See e.g., *Tsimshian Tribal Council v. British Columbia Treaty Commission et al*, 2005 BCSC 860; *Spookw v. Gitxsan Treaty Society*, 2014 BCSC 1100.

Since 2009, the Principals have been discussing ways to revitalize the process. Substantial changes are required if treaty-making is to become more effective. The Commission could have an important role in reforming the process but its current mandate may be too limited. The Commission was established by the joint operation of federal and provincial legislation.[110] The Commission's statutory powers and duties include the facilitation of treaty negotiations including assessing the readiness of the parties to *begin* negotiations. The Commission has not been tasked with the responsibility of assessing the parties' readiness, capacity, or mandate to continue negotiations once commenced. This is an important deficiency given the length of negotiations and the range of developments that affect progress at many tables. There is a critical need for oversight throughout the process, a role the Commission could take on. A reformed Commission could also:

- measure progress at negotiation tables based on established criteria and provide periodic reports to the Principals;
- where the prospect of a treaty is unlikely, explore the feasibility of alternative reconciliation arrangements with the parties;
- assist First Nations with the resolution of shared territory and overlapping claims; and
- continue its reporting, public education, and communication functions.

NEGOTIATION SUPPORT FUNDING

The Commission's statutory powers include the allocation of funding provided by the Crown to enable First Nations to participate in negotiations.[111] Funding is allocated in accordance with criteria agreed to by the Principals. I understand, however, that there are sharp differences between the Principals about the allocation of funding. Canada is frustrated by what it considers a lack of accountability in how funding is allocated and used.

At present, the Commission assesses funding requests and allocates funding in accordance with two agreements.[112] Canada provides 100 percent of loan funding and 60 percent of contribution funding but has no role in assessing funding decisions for negotiation tables. The Commission's funding decisions are largely based on work plans developed unilaterally by First Nations.[113]

Under the current approach, loan indebtedness has become a barrier both to concluding treaties and exiting from the process. Since the inception of the process, British Columbia First Nations have accumulated negotiation loans of approximately $500 million. The Commission has consistently acknowledged the concerns about indebtedness in its annual reports. Nevertheless, it continues to allocate funding even where little progress is being made and the conclusion of a treaty is unlikely.

More rigour needs to be applied in assessing requests and allocating funds as well as increased accountability and transparency about how funding is spent by First Nations. New funding allocation criteria and guidelines should tie funding to progress, taking into account annual work plans developed and agreed to by the parties. Canada should consider over the next year whether it is feasible to renegotiate the funding criteria and guidelines to promote greater accountability, or whether it should terminate the funding agreements and assume responsibility for the allocation of funding as it does elsewhere in the country.

110 *Treaty Commission Act*, R.S.B.C. 1996, c. 461 [*Treaty Commission Act*]; *British Columbia Treaty Commission Act*, S.C. 1995, c. 45 [*British Columbia Treaty Commission Act*].

111 *Treaty Commission Act*, s. 5(3)(b) and *British Columbia Treaty Commission Act*, s. 5(3)(b).

112 The two agreements are the negotiation loan management agreement between Canada and the Commission, and the negotiation contribution agreement between Canada, the Commission, and British Columbia.

113 Only in the last two years has the Commission begun asking Canada and British Columbia for their negotiation work plans.

THE NON-RIGHTS BASED APPROACH

A foundational principle of the BC treaty process is that Canada does not play a gatekeeper role by assessing the strength of a First Nation's rights and title claim. Rather, the Commission accepts First Nations into the process and determines when the parties are ready to commence negotiations.

First Nations are expected to identify and address overlapping and shared territory issues with neighbouring First Nations. However, few First Nations have completed overlap agreements with their neighbours. There is a tension between this approach and evolving legal principles, particularly the Crown's duty to consult. The non-rights based approach has exacerbated overlapping claims thereby increasing the cost of negotiations and delaying the completion of agreements.

The non-rights based approach should be revisited given legal developments. One option would be the acceptance of new claims only if the Aboriginal group can demonstrate it is the proper rights-holding collective over a specified territory. In turn, the claim and its supporting evidence could be reviewed and an assessment completed, either by the Crown or a reformed Commission, before the parties agree to commence negotiations. The Principals should consider the circumstances under which negotiations could commence with a sub-collective. If Canada is not able to reach agreement with the other Principals about a negotiation process that reflects legal developments, it should reconsider its approach in British Columbia.

RECOMMENDATIONS

1. Canada, the First Nations Summit, and the government of British Columbia should consider changes to the mandate of the British Columbia Treaty Commission to enable the Commission to more effectively assess and facilitate progress in treaty negotiations and, where the conclusion of a treaty is unlikely, assist the parties in exploring other arrangements to advance reconciliation.

2. Negotiation support funding should be tied to progress achieved in negotiations taking into account annual work plans developed and agreed to by the parties.

3. Canada should assume responsibility for the provision of negotiating funding in the BC treaty process if it is unable to resolve its current funding impasse.

4. Canada should develop, with the First Nations Summit and the government of British Columbia, entry criteria for new claims in the BC treaty process.

C. Funding Negotiations

Aboriginal participation in treaty negotiations is funded by a combination of loans and contributions from the Crown.[114] Canada has made a significant investment in the modern treaty process, advancing in excess of $1 billion to Aboriginal groups through loan funding and contributions between 1973 and 2013:[115]

	OUTSIDE OF BC	BC TREATY PROCESS
Federal contributions to Aboriginal groups	$124,000,000	$119,000,000
Federal loans to Aboriginal groups	$351,000,000	$466,000,000
Sub-total	$475,000,000	$585,000,000
TOTAL	**$1,060,000,000**	

Table 5-2 sets out the value of the negotiation loans for the completed modern treaties at the date each was settled.

The lack of urgency in negotiations has led to high debt loads in Aboriginal communities. The average loan per table is approximately $10 million.[116]

Canada treats loans as an advance on the cash transfer component of a final agreement. This is consistent with the recommendations of the Coolican Report which endorsed the provision of interest-free loans to encourage groups to adhere to agreed-upon timetables and to prevent negotiations from becoming a "way of life".[117]

It does not appear that Mr. Coolican and his fellow commissioners anticipated final agreements would take more than 15 years on average to complete. By the time Mr. Lornie considered loans in 2011, the debt burden for participating First Nations in the BC treaty process had become an "unsustainable barrier to progress".[118]

Negotiations have indeed become a "way of life" for many Aboriginal communities. The anticipated capital transfer for some will be substantially offset by their loan debt. The debt is particularly onerous for Aboriginal groups with comparatively small populations and for groups that have been engaged in negotiations for long periods. It is troubling that debt has accumulated even when there has been little or no activity at tables.

Some Aboriginal groups are no longer in active negotiations but have not formally withdrawn from the process because of concerns that Canada will seek repayment of their loans. High debt loads also serve as a disincentive for Aboriginal groups to enter into treaty negotiations. Debt remains on the balance sheets of Aboriginal groups and can affect their credit worthiness, potentially interfering with non-treaty activities. Although Aboriginal leaders are ultimately accountable to their members for the amount of debt accumulated during negotiations, some

114 Canada does not have a consistent funding approach across the country. In British Columbia, the Commission determines and allocates funding for First Nations participants. In other regions, Canada enters into bilateral loan agreements with each participating Aboriginal group based on established terms and conditions including the submission of approved work plans and budget proposals, year-end financial statements, and cost guidelines. Aboriginal groups receive a combination of contributions and loans wherever located. For some negotiations, Canada provides contribution funding without requiring Aboriginal groups to also borrow money. For example, Canada's proposal to negotiate incremental treaty and non-treaty agreements provides for contribution funding on a pilot basis. Negotiations that are initiated in response to litigation (*e.g.*, the Mi'kmaq and Maliseet in the Maritimes) are also fully funded through contributions. Interest accrues on negotiation loan funding once an agreement-in-principle has been approved except in British Columbia where loans are interest free until after a final agreement has been completed.

115 See Aboriginal Affairs and Northern Development Canada, Audit and Assurance Services Branch, *Internal Audit Report: Audit of Management of Negotiation Loans*" (February 2013), online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/au_mnl_1380805731781_eng.pdf [Internal Audit Report]. Of this amount, approximately $70 million is in the process of being repaid. The negotiation loans of 15 modern treaty groups have been repaid in full. Note that the federal contribution amounts include support for self-government negotiating tables.

116 See the Internal Audit Report.

117 *Living Treaties: Lasting Agreements*, at p. 90.

118 Lornie Report, at p. 29.

are of the opinion that Canada will never collect. This has resulted in a lack of disciplined spending and the use of loan funding for non-treaty purposes.

A consistent message at engagement meetings is that Canada must forgive negotiation loans. Aboriginal groups question why they have to borrow money to "get their land back". Many contend that loan debt ought to be written off as consideration for historic grievances, including the Crown's authorization of resource extraction from their territories. Some groups are clear that they do not intend to repay their loans.

There is substance to the assertion that modern treaty-making has contributed to the rise of an Aboriginal rights industry. While it may be true that negotiation loans have enhanced capacity within Aboriginal communities, there are more direct and transparent ways to address capacity development.

Adequate negotiation funding is critical for the success of modern treaties and other reconciliation arrangements because Aboriginal participants are at a relative disadvantage compared to the Crown in terms of their capacity and experience, and depend on the advice and assistance of professional advisors.

Problems with the current funding approach are not new. The provision of loans has not served as an incentive to expeditiously conclude treaty negotiations. The current funding model is not sustainable and the already high debt burden will escalate if nothing is done.

Difficulties with the current approach give rise to two issues: how should negotiations be funded going forward, and what should be done about the accrued debt.

Apart from implementing process efficiencies to bring existing negotiations to a timely conclusion, other measures should be implemented to establish a more disciplined approach. Funding needs to be linked to negotiation activity and progress. This will require a realistic assessment of where tables are in the process. The combination of loans and contributions should continue for tables that are making headway, but the provision of funding should be based on a more rigorous approach including the development of a tariff establishing the amount of the indemnity for specific steps undertaken during negotiations in a manner similar to the way costs are assessed in civil litigation. If a tariff is adopted, discretion should be exercised to ensure the level of funding is commensurate with activity. Doing so should result in more attention to work planning and the management of costs. It would also prevent the allocation of funding for purposes other than treaty negotiations. Where closing tables have high debt loads, Canada should consider increasing the ratio of contributions to loans if doing so would bring negotiations to a conclusion.

Where appropriate, contribution funding should be considered for other reconciliation arrangements at those tables where the parties agree that a modern treaty is not a realistic short or long term objective.

The underlying problem is the accumulated debt. The Commission advocates debt forgiveness for First Nations that are no longer able to conclude a treaty.[119] The Summit is seeking debt forgiveness for all participating groups and relies on the United Nations Declaration of the Rights of Indigenous Peoples to contend that First Nations should not be required to borrow money but should be funded through non-repayable contributions.[120] The Summit also points out that Canada has caused delays through its internal mandating processes and other measures, thereby contributing to the debt that has been incurred.

119 BC Treaty Commission 2014 Annual Report, at p. 2.
120 Summit Paper, at pp. 18–20.

These are compelling arguments. But it is also true that Aboriginal groups entered treaty negotiations knowing how funding would be provided and they agreed their loans would be repaid. Furthermore, many groups have or are in the process of repaying the moneys borrowed for negotiations. The problems associated with high debt loads should have been apparent years ago but regrettably steps were not taken to address the issue. Blanket forgiveness of debt would be an ill-advised strategy for many reasons. It would be unfair to those groups who have repaid or are in the process of repaying their loans. It would also perversely benefit those who used their negotiation loan funding for non-treaty purposes and have incurred unnecessarily large loans. Most importantly, it would avoid confronting the underlying problem — why so much money was spent with so few results. A better approach than wholesale loan forgiveness would be to deal with the issue on a table-by-table basis at the appropriate time.

RECOMMENDATIONS

1. Canada should standardize its funding approaches across the country and develop consistent and transparent negotiation cost guidelines and an appropriate accountability framework.

2. The provision of funding should be linked to negotiation activity and progress. This will require jointly developed multi-year work plans that establish clear and measurable milestones and the development of a tariff prescribing the indemnification for specific steps in the negotiation process.

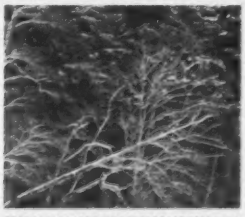

TABLE 5-2

Negotiation Loans for Completed Modern Treaties*

NAME OF AGREEMENT	DATE SETTLED	LOAN AMOUNT
Inuvialuit Land Claims Agreement	1984	$14,000,000
Gwich'in Comprehensive Land Claim Agreement	1992	$ 8,145,172
Nunavut Land Claims Agreement	1993	$40,394,809
Sahtu Dene and Métis Land Claim Agreement	1993	$10,813,186
Vuntut Gwitchin First Nation Final Agreement	1995	$ 5,620,939
Nacho Nyak Dun Final Agreement	1995	$ 4,560,462
Teslin Tlingit Final Agreement	1995	$ 5,472,276
Champagne & Aishihik Final Agreement	1995	$ 8,073,870
Little Salmon / Carmacks Final Agreement	1997	$ 7,919,649
Selkirk First Nation Final Agreement	1997	$ 8,393,706
Tr'ondëk Hwëch'in Final Agreement	1998	$11,279,459
Nisga'a Final Agreement	1998	$60,064,661
Ta'an Kwächʼän Council Final Agreement	2002	$10,071,729
Tlicho Final Agreement	2003	$26,336,095
Labrador Inuit Land Claims Agreement	2003	$51,311,510
Kluane First Nation Final Agreement	2004	$ 9,455,929
Kwanlin Dun First Nation Final Agreement	2005	$16,942,904
Carcross/Tagish First Nation Final Agreement	2005	$14,692,532
Nunavik Inuit Land Claims Agreement	2006	$12,788,683
Tsawwassen First Nation Final Agreement	2007	$ 5,561,480
Maa-nulth First Nations Final Agreement	2009	$12,745,836
Eeyou Marine Region Final Agreement	2010	$ 2,732,082
Yale First Nation Final Agreement	2013	$ 6,487,714
Tla'amin Final Agreement	2014	$11,678,290
TOTAL LOANS		**$365,542,973**

* Loan data for the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement is unavailable.

D. Shared Territories and Overlapping Claims

Shared territories and overlapping claims are situations where more than one Aboriginal group has potential or established Aboriginal or treaty rights in the same geographic area. The issue affects most Aboriginal groups that have unresolved section 35(1) claims, whether or not in treaty negotiations.

Disputes between Aboriginal groups about shared territories and overlapping claims are a pervasive problem and a significant barrier to treaty-making. The Commission has consistently identified overlapping claims as one of the biggest challenges that a First Nation must overcome.[121] When left unresolved, these disputes delay the completion of modern treaties and other land and resource agreements, and impede project development.[122]

> These issues have always been there, but now we are having to address them because some of the tribes are embarking upon treaty negotiations. This has been around for a long time, and it just floated to the surface. Overlapping territories did not start with the Treaty Commission.
>
> ...
>
> This is an issue that First Nations should have been resolving internally a long time ago, protocol arrangements between tribes to say, do we agree where a traditional boundary was? If we don't, then we better do that. If we cannot, then we need to figure out if this is some sort of traditional area that we will share and that we need to come up with a management agreement. Personal rights, do not get disturbed simply by the fact that we acknowledge that the boundary is here. That should actually be said in the protocol agreement.
>
> *Hon. Steven Point, O.B.C. in the BC Treaty Commission Annual Report 2014, p. 9.*

Overlapping claims can be traced to pre-contact Aboriginal societies. The Royal Commission Report estimated there are between 60 and 80 historically based Aboriginal "nations" in present-day Canada living in a thousand or so local Aboriginal "communities".[123] These nations have different histories, languages, cultures, government structures, and spiritual beliefs. Pre-contact Aboriginal societies were not all divided geographically into distinct collectives with inviolable borders. In the context of contemporary legal principles, this means there are geographic areas where it is possible that Aboriginal title may be shared between two or more Aboriginal nations, as well as areas with shared, non-exclusive, site-specific Aboriginal rights.[124]

The *Indian Act* amplified difficulties with shared territories and overlapping claims. There are 203 *Indian Act* bands that have claims in British Columbia. The designation of an Aboriginal group as a band under the *Indian Act* does not necessarily mean it is the proper rights-holding collective.

121 See, for example, the BC Treaty Commission annual reports from 2009 through 2014.

122 Aboriginal communities claiming the same traditional territory frequently clash over project development in those areas. Industry is frequently confronted with disputes between First Nations about potential impacts and the allocation of benefits associated with project development.

123 *Royal Commission Report*, vol. 2, *Restructuring the Relationship*, at p. 166.

124 *Delgamuukw*, at paras. 158–159.

> The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter the true identity of the people. Their true identity lies in their…lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights…
>
> Vickers J., *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at para. 469.

Since 1973, Canada has consistently encouraged Aboriginal groups to resolve overlapping claims between themselves. The 1981 and 1986 Policies established that no land in areas of shared territory would be granted as part of a comprehensive land claim unless boundary disputes had been resolved.[125] The Coolican Report supported this approach, recommending that rights in an overlap area not be recognized until after the overlap had been resolved.[126] The BC task force was more nuanced, indicating that overlap issues did not have to be resolved prior to the commencement of negotiations.[127] Recommendation 8 from the BC Task Force Report called on First Nations to resolve issues relating to overlapping traditional territories among themselves. Aboriginal organizations agree and regularly issue declarations and pass resolutions to that effect.[128] Nevertheless, Canada has completed treaties in areas where overlap disputes have not been resolved.

Outside British Columbia, Canada determines whether it will accept a comprehensive land claim for negotiation by conducting a preliminary assessment of the strength of the collective's claim. However, Aboriginal groups are accepted into the claims process even where there are known overlap disputes. Once a claim has been accepted, Canada does not insist that the collective remain intact. Where collectives have disaggregated, the resulting overlaps have been as challenging to resolve as those in the BC treaty process.

Entry into the BC treaty process is initiated by a First Nation's "governing body" filing a "short and succinct" description of the "general geographic area" of the claimed traditional territory as well as proof it has a mandate from its constituents to enter the process.[129] Consistent with the BC Task Force Report, First Nations may organize themselves as they wish.[130] Because the BC treaty process is based on an assertion of Aboriginal rights, at no point does a First Nation have to *prove* it has Aboriginal rights in the claimed area. The process has been abused, some suggest, by First Nations asserting claim areas beyond their traditional territories that intrude into the territories of others.

There are many examples of Aboriginal groups being unable to resolve their differences about territorial boundaries. The enmity between some groups pre-dates modern treaty-making and is so rooted that efforts to resolve impasses are often futile.

Modern treaty-making has exposed and aggravated these divisions. Although non-derogation provisions provide that nothing in a treaty will affect the section 35(1) rights of groups who are not parties to the agreement, injunctions and other remedies have been pursued to prevent

125 The 1993 Policy was silent.
126 *Living Treaties: Lasting Agreements*, at p. 91.
127 BC Task Force Report, at p. 17.
128 In 2013, the Summit declared overlapping territories a priority and directed a task group to consider solutions. Similarly, in 2014 the Union of BC Indian Chiefs passed a resolution that supported further engagement with Canada and British Columbia to advance the resolution of shared territory issues. Neither the Summit nor the Union is in a position to impose solutions where these disputes exist.
129 BC Task Force Report, at p. 16.
130 The Commission's definition of "First Nation" is one that has elements of "nationhood" which include: a shared sense of identity, language, laws and customs among the Aboriginal people; historical exercise of control over a distinct traditional territory that is not wholly shared or disputed; a degree of historical existence as a governing body; and a reasonably sizeable body of Aboriginal people able to sustain the effective negotiation and implementation of a treaty. See http://www.bctreaty.net/files/sixstages-1.php.

the Crown from completing agreements-in-principle and final agreements.[131] Many Aboriginal groups not in the treaty process lack the resources and capacity to address the complexities of modern treaties or how those agreements may affect their rights, and are often reluctant to become engaged in discussions about the terms of a neighbouring community's proposed treaty. Furthermore, Aboriginal groups are not under a legal obligation to participate in discussions about another group's proposed treaty. There is little incentive for groups to meet to discuss competing claims when there is little to gain in doing so.

The Crown can no longer rely on Aboriginal groups to sort out overlapping claims. In 2004, the Supreme Court of Canada developed the principle that the Crown has a legal duty to consult with Aboriginal people and accommodate their interests before making a decision or taking an action that may adversely affect not only proven but also claimed Aboriginal rights.[132] Approving a proposed treaty constitutes a decision or action requiring consultation. The non-derogation provisions in a treaty are not sufficient comfort that a treaty will not affect another group's rights. The Interim Policy acknowledges this shift by noting while Aboriginal groups are best placed to resolve these matters, Canada will consult where there may be a potential adverse impact on another group's claimed or proven section 35(1) rights.

The duty to consult is a time and resource intensive process that inevitably delays completion of final agreements. Moreover, Crown consultations, even if they meet the legal duty, often do not resolve the underlying dispute between groups.

There has been uncertainty about when and in what circumstances the duty to consult arises. In the past, the Crown has argued that it does not have to consult and accommodate on *every* potential overlapping claim before completing a treaty because doing so would mean the Crown could never finalize treaties.[133] In some instances, the Crown has undertaken consultations *after* a final agreement has been negotiated.[134] However, the Federal Court of Canada recently ruled that Crown consultations should occur *before* the completion of an agreement-in-principle, because approval of such an agreement is considered "Crown conduct".[135] The ruling is precedent setting. There has already been a subsequent judicial decision affirming this position.[136]

There is no obvious fix to this complicated issue. All parties share responsibility to resolve the problems where they arise. Outlined below are elements of a strategy that address shared territories and overlapping claims.

DISPUTE RESOLUTION MODELS

While many overlap disputes have become intractable, there are examples of mediation and facilitation resulting in successful outcomes. The Manitoba Denesuline, the Saskatchewan Athabasca Denesuline, and the Nunavut Inuit successfully resolved their shared territory issues through a facilitation process led by a former Supreme Court of Canada judge that resulted in a tripartite memorandum of agreement. A similar process led by a retired justice from the Court of Appeal for British Columbia involving the Tsawwassen and Cowichan First Nations also yielded a

131 *Luuxhon v. Attorney General (Canada)*, 1999 CanLII 6180 (BCSC); *Chief Allan Apsassin v. Attorney General (Canada)*, 2007 BCSC 492 [*Apsassin*]; *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 [*Cook*]; *Samboa K'e Dene First Nation v. Duncan*, 2012 FC 204 [*Samboa K'e*]; *Tseshaht First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141 [*Tseshaht First Nation*].

132 See *Haida Nation*. See also *Rio Tinto*, at para. 32.

133 *Cook*, at paras. 13 and 134.

134 See *Apsassin*; *Tseshaht First Nation*; and *Cook*.

135 See *Samboa K'e*. Agreements-in-principle are not legally binding and the boundaries of treaty settlement lands are generally not confirmed until the final agreement stage of negotiations. Despite this, the Federal Court held meaningful consultation cannot be postponed until the last and final point, and that momentum may develop even if preliminary decisions are not legally binding on the parties. The court held the impacts on the other group's rights were more than speculative in light of the limited amount of land available and decisions around land quantum and selection already made by Canada in the context of the treaty negotiations.

136 *Huron-Wendat Nation of Wendake c. Canada*, 2014 CF 1154.

successful result. Establishing a roster of retired judges and dispute resolution specialists with experience in Aboriginal law would be useful to support bilateral discussions between Aboriginal groups. Dispute resolution models that incorporate elements of both common law and indigenous legal principles, and are culturally sensitive to the leadership models in Aboriginal communities, should be encouraged.

Superior courts in Canada provide dispute resolution services for litigants. The Federal Court of Canada, for instance, offers expansive dispute resolution services for parties involved in legal proceedings, including mediation, an early neutral evaluation of a proceeding, and a non-binding mini-trial. Aboriginal groups engaged in overlap disputes should avail themselves of these dispute resolution services. They are without prejudice to the issue between the parties.

It costs money to address these disputes. Canada should offer funding to initiate discussions between Aboriginal groups. But continued funding should be contingent on an assessment whether the discussions have been productive and if they will assist the Crown in meeting its consultation obligations. Canada should also encourage Aboriginal groups to consider a range of solutions. Reasonable outcomes should be implemented promptly even where they may affect established Crown mandates. In turn, Aboriginal groups must be prepared to allow Canada to rely on the resolutions they reach as part of fulfilling the Crown's duty to consult.

ENCOURAGING ABORIGINAL "NATION" BUILDING

In the Commission's most recent annual report, a former chief commissioner proposed that a British Columbia-wide First Nations authority focus on shared territories and overlapping claims and develop a First Nations consensus about a comprehensive map of the province.[137] This is an ambitious proposal. Nevertheless, Canada should encourage the First Nations Leadership Council in British Columbia, and other regional Aboriginal organizations, to pursue this or similar initiatives. Efforts to aggregate into larger Aboriginal "nations" are bound to create controversies but doing so is the most effective means to address this endemic problem.

STRENGTH OF CLAIM ASSESSMENTS

Canada has commenced strength of claim assessments in some areas where one or more Aboriginal groups assert that a proposed treaty or economic development project may have an adverse impact on their Aboriginal rights. I understand the government of British Columbia is engaged in a similar exercise. In light of the legal consultation obligations and the importance of treaty-making as a shared societal interest, this is important work and should continue. The Crown shares the results of its strength of claim assessment with Aboriginal groups. The Crown should continue to encourage those communities to provide any ethno-historical, archaeological, and other evidence that supports their assertion of Aboriginal rights.

STRATEGIC LAND USE PLANNING

An indirect way to address disputes about shared territories and overlapping claims is to encourage strategic land use and resource development planning exercises. Canada should support initiatives that address common areas of interest between Aboriginal groups including project planning and development, cumulative impacts of economic development, fisheries enhancement strategies, and Aboriginal participation in environmental assessment processes.

137 BC Treaty Commission 2014 Annual Report, at p. 5.

INTERIM STEPS

Canada's new reconciliation framework needs to reflect the legal reality that overlapping claims need to be addressed. This does not mean the overlapping group has a veto over the completion of a treaty, but it does mean consultations with Aboriginal groups about the potential effects of a proposed treaty need to be initiated at the earliest opportunity. As the courts have already instructed, Canada must complete consultations before approving agreements-in-principle. This means the Crown should encourage Aboriginal groups to cooperate in addressing their territorial boundary issues.

RECOMMENDATIONS

1. Canada, in conjunction with provincial and territorial governments and Aboriginal groups, should establish a roster of retired judges and dispute resolution specialists to address disputes about territorial boundaries.

2. Canada should support dispute resolution models that incorporate both common law and indigenous legal principles.

3. Canada should encourage Aboriginal groups to use various dispute resolution models to resolve shared territory and overlap disputes, including the Federal Court of Canada's dispute resolution services.

4. Canada, in collaboration with provinces and territories, should develop criteria for the provision of funding for the resolution of shared territories and overlapping claims.

5. Canada should encourage Aboriginal groups to be innovative in their resolution of overlap disputes and should be prepared to implement reasonable resolutions, even where those resolutions may not be consistent with existing treaty mandates.

6. Canada should support and encourage initiatives that address common areas of interest between Aboriginal groups.

7. Canada should encourage the First Nations Leadership Council in British Columbia, and regional Aboriginal organizations elsewhere in the country, to pursue aggregations of rights-holding collectives.

E. Extinguishment, Certainty, and Finality

There is an ongoing perception by some Aboriginal groups that the object and purpose of modern treaty-making is to extinguish Aboriginal interests in lands and resources for a lesser interest over a smaller territory. Some groups advance a more controversial proposition, contending that Canada's objective is to terminate Aboriginal rights in order to "push through" resource projects.[138]

As discussed below, extinguishment and the related concepts of certainty and finality have a long and controversial history in relation to treaty-making.

THE HISTORIC APPROACH TO CERTAINTY

The earliest treaties in present-day Canada were designed to secure military alliances between Europeans and Aboriginal groups and to promote peaceful relations, economic and commercial trade, and European settlement. Settlement and expansion of Upper Canada and the west were accomplished by treaties that resulted in the surrender of lands, the creation of reserves, and a guarantee of the right to hunt and fish on unoccupied lands. Canada's objective was to remove Aboriginal people from their lands in an orderly fashion to make way for settlement and development.[139]

To illustrate, in 1849 the whole of Vancouver Island was granted to the Hudson's Bay Company by the Imperial Crown. It was a condition of the grant that Vancouver Island be opened for settlement. James Douglas, the Hudson's Bay Company's principal representative on Vancouver Island, was instructed to negotiate with Aboriginal groups for the acquisition of lands. Mr. Douglas concluded 14 treaties which involved the "surrender, entirely and for ever" of specific tracts of land in return for goods (blankets and caps) and the right for Aboriginal groups to continue to occupy existing villages, use cultivated lands, and hunt and fish in unoccupied areas.[140] Similarly, the objectives of the Robinson treaties in northern Ontario were to "clear aboriginal title for the development of minerals".[141] Under the numbered treaties, Aboriginal groups agreed to "cede, release, surrender and yield up " to Canada large tracts of land in order to open up those lands "to settlement and immigration" in exchange for various items such as cash, tools, farming supplies, and blankets.[142]

The Unique Case of the Douglas Treaties

Twelve First Nations on Vancouver Island claim rights under the Douglas treaties. Canada has taken no formal position as to who it recognizes as the modern day beneficiaries of these treaties. This has impacted Canada's relationship with these groups and creates challenges in modern treaty negotiations, specific claims, and consultation processes. Canada should recognize the modern day beneficiaries of the Douglas treaties and initiate negotiations to address their section 35(1) rights.

Historic treaties achieved certainty if not finality by extinguishing Aboriginal title to surrendered lands and resources. By today's standards, these agreements would be considered unconscionable transactions because of the imbalance in power between the parties and the nature of the bargains.[143] The legacy of these historic treaties continues to influence contemporary perspectives about the object and purpose of modern treaty-making.

138 See http://www.idlenomore.ca/turn_the_tables.
139 *A New Partnership*, at p. 13.
140 Lambert J.A. discusses the history of the Douglas treaties and the rights granted under those treaties in *R. v. Bartleman*, (1984), 55 B.C.L.R. 78.
141 *Living Treaties: Lasting Agreements*, at p. 3.
142 For example, see text of treaties 1 and 2 at http://www.aadnc-aandc.gc.ca/eng/1100100028664/1100100028665.
143 *Living Treaties: Lasting Agreements*, at p. 2.

THE PENNER, COOLICAN, ROYAL COMMISSION, AND HAMILTON ASSESSMENTS OF CERTAINTY

Canada continued to follow the pattern established by the historic treaties in the James Bay and Northern Quebec Agreement (1975), the Northeastern Quebec Agreement (1978), and the Inuvialuit Final Agreement (1984). Canada's approach in those negotiations was to obtain finality by securing clear title to land for economic and resource development. Those agreements provided for the surrender and extinguishment of all Aboriginal rights and title. Legislation to approve the treaties expressly extinguished all Aboriginal claims, rights, title, and interests. The approach of combining a surrender of rights in a treaty with legislated extinguishment is referred to as "blanket extinguishment".

The Penner Report was released in 1983 following the recognition and affirmation of Aboriginal and treaty rights in section 35(1). It recommended Canada's policy of extinguishment be eliminated as a requirement for modern treaties.[144]

In 1985, the Coolican Report described Canada's insistence on finality and the blanket extinguishment model as a significant obstacle in completing modern treaties.[145] The authors proposed the development of a new certainty model that would:

- be acceptable to Aboriginal groups;
- encourage investment in and development of lands and resources;
- be easily understood; and
- fit comfortably into the dominant property law system.[146]

The Coolican Report's approach to certainty would require the surrender of land-related Aboriginal rights, but not the surrender of other Aboriginal rights that might eventually receive definition through the courts or by legislation, including those related to culture, social, political, linguistic, and religious practices.[147]

The Coolican Report led to a change in Canada's approach. The 1986 Policy acknowledged that the requirement for Aboriginal groups to extinguish their Aboriginal rights and title as part of a modern treaty had "provoked strong reactions".[148] The 1986 Policy identified alternatives to blanket extinguishment: the Aboriginal rights released in a modern treaty would be limited to land and resources; other Aboriginal rights, as may be defined or recognized by the courts, would not be affected by the terms of a treaty.[149] At the time of the 1986 Policy, Canada intended modern treaties to address land and resource rights, and did not contemplate constitutionally protecting self-government rights. When Canada later agreed to negotiate governance and other section 35(1) rights in modern treaties, it also expected to obtain certainty over any related pre-existing Aboriginal rights.

The seven modern treaties completed between 1992 and 1994 do not use the word "extinguishment" nor does the legislation giving effect to those agreements seek to extinguish Aboriginal rights. The preambles to those agreements confirm that the signatories "assert" Aboriginal title to the claim areas and that section 35(1) recognizes and affirms existing Aboriginal and treaty

144 *Indian Self-Government in Canada*, at pp. 113–116 and 147.
145 *Living Treaties: Lasting Agreements*, at p. 13.
146 *Living Treaties: Lasting Agreements*, at pp. 41–43.
147 *Living Treaties: Lasting Agreements*, at p. 42.
148 Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services Canada, 1987), at pp. 11–12 [1986 Policy].
149 *1986 Policy*, at pp. 11–12.

rights. In return for the surrender of pre-existing Aboriginal rights, the treaties grant back specific rights and benefits including fee simple ownership of land.

Despite the change in approach, concerns about the requirement to surrender Aboriginal rights to land and resources persisted.

In 1995, the Royal Commission published an interim report, *Treaty-Making in the Spirit of Co-Existence: An Alternative to Extinguishment*.[150] The Royal Commission observed that, in its view, Canada's overarching objective in treaty-making was to achieve clarity and certainty about the respective rights and obligations of the parties and that Canada did not want undefined Aboriginal rights to undermine those rights and obligations. While the Royal Commission indicated this was a legitimate expectation, it felt there were less drastic options to achieve this outcome than requiring the surrender of pre-existing rights. The Royal Commission noted that Canada's approach unfairly severed the relationship between Aboriginal people and their land.

> One of the most frustrating things for First Nations and for our people is the issue of extinguishment of Aboriginal rights. ...We think that there is no need for extinguishment. We feel that asking Aboriginal people to extinguish their rights would be equivalent to asking Canadians to give up their Canadian citizenship. Therefore, that is why it is so difficult when it comes to dealing with the comprehensive claim policy for many of our people.
>
> *Chief Jean-Guy Whiteduck of the Algonquins of Maniwaki, Quebec, speaking during the second round of the Royal Commission's hearings.*

The Royal Commission recommended a new certainty model that did not require surrender. Rather, under its proposed approach, the parties would negotiate an agreement that recognized, as exhaustively as possible, all of the parties' rights within the claim area, including Aboriginal rights, the rights of the Crown, and those of third parties.[151] Any pre-existing rights of an Aboriginal group not identified in a treaty would continue, but in the event of a conflict, Crown and third party rights would prevail. In addition, the Royal Commission recommended that the treaty rights of an Aboriginal group should be able to evolve with legal developments, and Aboriginal rights not contemplated by the parties at the time of negotiations could be brought into a treaty through good faith bargaining.

Prior to the release of the Royal Commission's interim report, Mr. Hamilton was appointed by Canada as an independent fact finder with a mandate to examine existing and potential certainty models and to assess whether certainty over land and resources could be obtained without the necessity of surrendering Aboriginal rights. Mr. Hamilton concluded that the surrender of Aboriginal rights, under any circumstances, was unnecessary for the purposes of achieving legal certainty.[152] Instead, he proposed a new model for certainty.

CANADA'S CURRENT APPROACH TO CERTAINTY

Both the Royal Commission and Hamilton Reports influenced Canada's approach to certainty. Following publication of those reports, Canada acknowledged that legal certainty was possible without requiring a surrender of rights and sought to develop alternatives that were as legally

150 Royal Commission on Aboriginal Peoples, *Treaty-Making in the Spirit of Co-Existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services Canada, 1995) online: http://qspace.library.queensu.ca/jspui/bitstream/1974/7731/1/Treaty_Making.pdf. The conclusions in this interim report were reiterated in the final report.

151 The model envisioned three tiers of land: a core treaty settlement land area where Aboriginal jurisdiction and rights would be greatest and the role of the Crown would be limited; a second tier where both Aboriginal and Crown jurisdictions would operate and would need to be clarified, including co-jurisdiction and co-management; and a third tier where only Crown jurisdiction applied along with Aboriginal rights to gathering and cultural practices.

152 *A New Partnership*, at p. 72.

effective as cede, release, and surrender. In doing so, Canada adopted parts of the certainty models proposed by the Royal Commission and Mr. Hamilton.[153] A key aspect that informed the new techniques was the inclusion of language that contemplated the continuation of pre-existing Aboriginal rights while making clear that the Aboriginal group would only exercise the rights set out in the treaty. This approach provides assurance that the parties can rely on the terms of the agreement to govern their relationship into the future. The techniques are also reinforced by releases and indemnities from the Aboriginal beneficiaries for any claims of infringement of pre-existing Aboriginal rights. The nine treaties concluded since 1995 have adopted this approach as an alternative to a surrender of rights.

1. Modification of Rights Technique

The Nisga'a final agreement achieves legal certainty by confirming that all of the Aboriginal group's section 35(1) rights are exhaustively set out in the agreement, including previously undefined Aboriginal rights and title, which are transformed into, continued, and given definition as treaty rights. Because the modification of rights technique has the effect of making the Aboriginal rights fully congruent with the treaty rights, there is no need for surrender.

2. Non-Assertion Technique

In the Tlicho final agreement, the parties employed a "non-assertion" technique in which the Tlicho commit not to assert or exercise section 35(1) rights other than the rights in the treaty. The agreement includes a purpose clause to confirm the parties' shared objective in including the non-assertion clause, specifically to enable the Tlicho beneficiaries to exercise their treaty rights, and also to enable the Crown and other persons to exercise their rights, free from the effects of any section 35(1) rights that are different from the treaty rights.

3. Back-Up Release

Initially, both the modification and non-assertion techniques included a mechanism for the release of continuing Aboriginal rights, which would become operational in the event the certainty technique did not achieve its intended purpose. The "back-up" release was viewed as an indirect form of extinguishment by some Aboriginal groups. In response, Canada dropped the requirement for a back-up release in the modification approach in the Tsawwassen final agreement and subsequent final agreements. In 2014, Canada also indicated its willingness to negotiate a non-assertion technique without a back-up release.

4. Variation of the Modification of Rights Technique

Finally, the Eeyou Marine Regional Land Claim Agreement concluded in 2010 includes a variation of the modification of rights technique specifying that Aboriginal rights continue as Aboriginal rights outside the treaty to the extent that they are identical to rights set out in the agreement. To the extent that they are different, the rights continue as modified by the agreement. Again, this technique does not require the treaty beneficiaries to surrender pre-existing Aboriginal rights and does not require a back-up release.

CERTAINTY TECHNIQUES — SUMMARY

Despite Canada's new approaches to legal certainty, many Aboriginal groups continue to believe that the object and purpose of modern treaties are to extinguish Aboriginal rights.

The Summit, for example, continues to criticize Canada's approach and relies on an international opinion that there is a lack of perceptible difference between the cede, release, and surrender

153 Canada did not accept all recommendations. The certainty models proposed by the Royal Commission and Mr. Hamilton envisioned that all of the parties' rights in the claim area would be set out in a treaty. Canada has not adopted this approach, viewing it as overly complex and detailed. In addition, a key component of Mr. Hamilton's certainty model is a general recognition that an Aboriginal party has Aboriginal rights in the treaty area. Canada did not agree to this approach until recently.

language of historic treaties and Canada's current approach.[154] Many disagree with the Summit's position but the resulting controversy continues to undermine progress for many of the 75 Aboriginal groups that are in the treaty negotiations. Canada should consider retaining a retired judge to review current approaches and explain the implications of these provisions at tables where certainty continues to be an issue. Canada should also encourage Aboriginal groups in negotiations to meet with representatives of the 26 modern treaty communities who are well positioned to advise about their experience with certainty and modern treaties.

Certainty, extinguishment, and surrender are sensitive and difficult concepts. Ultimately, the Crown and some Aboriginal groups may never agree about how treaties ought to reconcile pre-existing Aboriginal rights. If an Aboriginal group believes a modern treaty is not a viable option for this reason, other forms of agreements and arrangements may provide an acceptable alternative to reconcile Aboriginal and Crown interests.

ADDRESSING THE "FINALITY" OF MODERN TREATIES

Treaties are designed to last forever, which places substantial pressure on the parties to get it right. From Canada's perspective, the arrangements negotiated in a modern treaty (particularly with respect to land and resource rights) and the compromises made to reach agreement should be honoured. Reopening final agreements that have taken years to complete is inconsistent with the principle of the sanctity of a contract and the need to keep parties to their bargain.

There are, however, circumstances that may warrant amendments to a modern treaty, including:

- developments in the common law including the identification of new Aboriginal rights;
- the effect of a major unforeseen event, *e.g.*, an environmental disaster, that may delay or prevent the exercise of an Aboriginal right; and
- the failure of a treaty to achieve the objectives of improving socio-economic conditions and facilitating economic development.

Modern treaties contemplate amendments where there is agreement between the parties. Any party may propose an amendment to add, substitute, or delete duties and obligations. Amendments can be proposed during the periodic review process or by the committees that oversee the execution of implementation plans. Also, Canada has agreed in one final agreement to an orderly process approach that can result in the amendment of a final agreement to incorporate Aboriginal rights that were not contemplated at the time the treaty was completed.

1. Periodic Reviews

Modern treaties provide for their periodic review at prescribed intervals. The Tla'amin Final Agreement, for example, contemplates a periodic review every 15 years. The review is limited to the functioning of the treaty's legal and administrative systems and other processes set out in the agreement. Where the parties agree, other implementation issues can be addressed during a periodic review.

The periodic review process provides a forum for the parties to discuss the final agreement but does not compel them to re-negotiate existing terms or negotiate new provisions. Because of the non-binding nature of a periodic review and the limits on what can be discussed, Aboriginal groups have expressed concern about their ability to re-open a treaty through the periodic review process.

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154 See Summit Paper, at pp. 34-35.

2. Implementation Plans and Committees

The majority of the 26 modern treaties include an implementation chapter providing for implementation plans and the establishment of implementation committees. Implementation plans describe the activities each party must undertake and timelines to implement their respective treaty obligations.

Implementation committees are designed to develop and maintain productive relationships. Each of the parties is represented on the committee. They can be used as a forum to discuss new developments including evolution of the common law on the exercise of treaty rights. Implementation committees also provide an ongoing forum for the parties to discuss the implementation of a final agreement and attempt to resolve any implementation issues between them.

3. Orderly Process

Canada agreed to an "orderly process" approach in the Tlicho final agreement which enables the Tlicho government to propose the inclusion of additional Aboriginal rights in the treaty that are unrelated to land and resources and were not contemplated at the time the treaty was completed.

Additional Aboriginal rights can be added to the treaty by agreement of the parties. If the parties do not agree about the nature of the claimed right, the Tlicho government is at liberty to seek a judicial declaration that it holds the Aboriginal right. If the declaration is granted, the Tlicho government can then compel Canada to negotiate the inclusion of the right in the treaty.

The orderly process clause contemplates arbitration if the parties are unable to agree how the Aboriginal right should be reflected in the treaty. The provision limits efforts to include new Aboriginal rights in the treaty to once every five years.

I understand other tables are considering the inclusion of orderly process provisions in their final agreements. However not all provincial and territorial governments are agreeable to this approach.

RECOMMENDATIONS

1. Canada should retain a retired judge to review Canada's certainty techniques, and explain the implications of these provisions, at treaty tables where there is apprehension or confusion about the proposed certainty provisions.

2. Canada should encourage Aboriginal groups to meet with representatives from the modern treaty communities to discuss their views about certainty and modern treaty implementation.

3. The scope of the periodic review process for modern treaties should be expanded to consider the potential for amendments to address:

   a. newly identified Aboriginal rights;

   b. the impact of unforeseen circumstances; and

   c. the failure to achieve the objectives of improving socio-economic conditions and facilitating economic development.

4. Canada should support the inclusion of an orderly process approach for all modern treaties.

F. Implementation

The Interim Policy makes passing reference to treaty implementation, including the assertion that Canada recognizes the importance of implementing modern treaties in a manner that upholds the honour of the Crown. This principle does not, however, appear to be fully reflected in practice.

I met with representatives from 14 of the 26 modern treaty communities. I also received submissions from the Land Claims Agreements Coalition ("LCAC"), which represents the modern treaty communities.

In 2003, the Land Claims Agreements Coalition published a discussion paper encouraging Canada to adopt an implementation policy reflecting the following principles:

- recognition that the Crown in right of Canada, not AANDC, is party to modern treaties;
- Canada must commit to achieving the broad objectives of modern treaties as opposed to technical compliance, including the provision of adequate funding to meet the objectives and obligations of modern treaties;
- implementation must be handled by appropriate senior level federal officials representing the entire Canadian government; and
- there must be an independent implementation audit and review body, separate from AANDC, preparing annual reports and reporting to Parliament.

There is a general sense Canada is failing to meet its implementation obligations. In 2008, the Standing Senate Committee on Aboriginal Peoples published the results of its study about the implementation of comprehensive land claims.[155] The committee offered four recommendations to address what it perceived as a lack of coordination of Canada's duties and obligations under modern treaties, as well as indifference by Canada to the economic and social objectives of those agreements. I was informed Canada has responded to each of these recommendations and has reported its efforts to address deficiencies.

The 5th report of the Senate Committee on Aboriginal Peoples evaluated the implementation of modern treaties and concluded that Canada's narrow approach to implementation was diminishing the benefits and rights promised to Aboriginal peoples under these agreements. The committee noted that Aboriginal groups negotiated benefits and rights in treaties in exchange for ceding Aboriginal title claims to vast traditional territories. The committee made the following recommendations:

- Canada should develop a new national land claims implementation policy, based on the principles endorsed by the members of LCAC;
- Canada should establish an independent commission, through legislation, to oversee implementation of modern treaties;
- Canada should develop a working group of senior officials to revisit authorities, roles, responsibilities, and capacities for the coordination of federal obligations under modern treaties with a view to establishing guidelines to ensure, among other things, the provision of central agency direction, guidance, and support to meet Canada's treaty obligations as well as the development of a government wide strategy to monitor and report on implementation; and
- Canada and LCAC should appoint a chief federal negotiator to negotiate implementation funding under modern treaties.

155 See *Honouring the Spirit of Modern Treaties*.

The auditor general of Canada has also reported on the implementation of modern treaties and has been critical of Canada for failing to support the full intent of the Nunavut, Gwich'in, and Inuvialuit final agreements.[156]

Canada's failure to implement the James Bay and Northern Quebec Agreement resulted in judicial proceedings initiated by the treaty beneficiaries. The parties eventually completed a "new relationship agreement" in 2008 that addressed all implementation issues, and included payment by Canada of $1.4 billion to settle related litigation and fund implementation for the next 20 years. Canada is currently facing a damages claim for $1 billion in relation to the implementation of the Nunavut land claims agreement.[157] The trial of this action is scheduled to commence later this year. These cases are an unfortunate but stark reminder of the risks to Canada if modern treaties are not fully and properly implemented.

Recent judicial decisions have addressed the content and scope of Canada's treaty obligations. The Supreme Court of Canada has confirmed that the honour of the Crown must inform the interpretation and implementation of treaties, whether historic or modern.[158] Furthermore, the Court has established the standard of diligent implementation, meaning that "Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise".[159]

Fundamental to effective implementation is the recognition that modern treaties are with the Crown and that many departments, not just AANDC, have obligations that must be fulfilled. There is a perception AANDC oversees the management of Canada's implementation obligations but does not have sufficient influence to properly do so. In fact, each department is responsible for managing its implementation obligations but treaty implementation does not appear to be a priority for all departments. There have been difficulties during the implementation of treaties with understanding or interpreting what negotiators meant or intended by certain provisions. There may also be a lack of awareness among many federal officials in their day-to-day work about the scope and intent of treaty obligations. Given the extent and significance of treaty implementation obligations, more oversight, awareness, and accountability are required within the federal system. To ensure the diligent implementation of modern treaties, a central agency should be responsible for managing the full range of Canada's obligations.

In 2008, LCAC developed and endorsed a model implementation policy for Canada's consideration.[160] In 2013, Canada agreed to participate in a working group with LCAC to pursue a number of shared implementation objectives, including the development of common principles and options for a "whole of government" approach. I understand the working group is making progress and I believe it is important for Canada to continue to collaborate with LCAC on the parties' shared objectives.

LCAC continues to urge Canada to adopt a stand-alone modern treaty implementation policy. Federal officials question whether a stand-alone policy would be an effective mechanism to address the acknowledged difficulties with treaty implementation. The challenges of treaty implementation are compounded by the fact there are unique provisions in each of the 26 modern treaties, establishing a range of obligations that must be fulfilled at different times and in different ways. Canada's relationship with each of the 26 First Nations governments

156 Office of the Auditor General of Canada, *2003 Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, November 2003), Chapter 8 — Indian and Northern Affairs Canada, Transferring Federal Responsibilities to the North, online: http://www.oag-bvg.gc.ca/internet/docs/2003no8ce.pdf and Office of the Auditor General of Canada, *2007 Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, October 2007), Chapter 3 — Inuvialuit Final Agreement, online: http://www.oag-bvg.gc.ca/internet/docs/20071003c_e.pdf.

157 See *NTI v. Canada (Attorney General)*, 2012 NUCJ 11.

158 See *Little Salmon/Carmacks*.

159 See *Manitoba Métis Federation*, at para. 80.

160 See Land Claims Agreements Coalition, *Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties Between Aboriginal Peoples and the Crown* (November 21, 2008), online: http://www.landclaimscoalition.ca/assets/LCAC_Model_Policy_Document2.pdf.

is also different. The interests and capacities of those governments are diverse. Instead of developing a stand-alone policy, it may be more effective to ensure adequate funding and resources for those departments that have implementation obligations, and to enhance internal government structures to monitor and coordinate implementation activities.

Implementation is not only about fulfilling specific transactional obligations. It is also about honouring and fulfilling the spirit and intent of a treaty. Modern treaties need to be implemented in an effective, organized, and generous manner, bearing in mind that successful treaty implementation is part of an ongoing and collaborative relationship.

The scope of the obligations imposed by the honour of the Crown may not be fully appreciated within all federal departments and agencies. Recent judicial decisions have expanded Crown liability in the area of treaty implementation. Consequently, steps should be taken to ensure officials responsible for implementing various aspects of modern treaties are fully aware of what is required. In 2012, the Hon. Lance Finch, who was then chief justice of British Columbia, presented a paper wherein he linked the principle of the honour of the Crown with a duty for members of the legal profession to learn about Aboriginal legal perspectives.[161] In much the same way, federal officials should be encouraged to learn about and better understand the Aboriginal perspective and how Aboriginal rights have been articulated and guarded by the courts. As a practical measure, Canada should develop training programs for federal officials to promote the diligent, prompt, effectual, and equitable implementation of treaties.

RECOMMENDATIONS

1. Canada should increase awareness, oversight, and accountability across departments about modern treaty obligations and improve internal structures for co-ordinating and fulfilling implementation activities.

2. Canada should centralize responsibility for the coordination and oversight of modern treaty implementation in a central agency.

3. Canada should continue to collaborate with the Land Claims Agreements Coalition to advance the parties' shared objectives.

4. Canada should ensure treaty provisions are interpreted and given effect in the manner intended by negotiators.

5. Canada should develop a training program for federal officials whose responsibilities involve treaty implementation.

6. Canada should, through the central agency responsible for the coordination and oversight of treaty implementation, file an annual report in Parliament about treaty implementation activities.

161 Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper presented at The Continuing Legal Education of BC Indigenous Legal Orders and the Common Law Conference, Vancouver, 15 November 2012).

SECTION 6 — Concluding Comments

SECTION 6 — Concluding Comments

Canada and Aboriginal groups have struggled to reconcile the prior Aboriginal occupation of the land with the reality of Crown sovereignty. Over the past six decades, various approaches to reconciliation have been proposed. Many initiatives have been implemented but they have produced uneven results. It has been challenging for the parties to get it right.

Canada's initiative to develop a new framework to address section 35 Aboriginal rights has been generally well received. The Interim Policy acknowledges that the document is intended as a high level starting point for discussions about how Canada can work with its partners to renew the relationship between Aboriginal and non-Aboriginal Canadians.

This report is being delivered to the Minister of Aboriginal Affairs and Northern Development but I hope it will encourage all parties to engage in an objective assessment of the comprehensive land claims process, and that the proposed recommendations will be considered a constructive starting point for further dialogue about the reconciliation of Crown and Aboriginal interests.

Advancing Aboriginal and treaty rights will require collaboration, patience, creativity, and commitment by all parties.

Appendices

Appendix A — List of Engagement Participants

ABORIGINAL GROUPS

- Acho Dene Koe First Nation
- Ahousaht First Nation
- Akaitcho Treaty 8 Tribal Corporation
- Algonquins of Ontario
- Algonquins of Québec
- Assembly of First Nations Chiefs of New Brunswick (Buctouche, Esgenoôpetitj, Eel Ground, Eel River Bar, Fort Folly, Indian Island, Kingsclear, Oromocto, Pabineau, Red Bank, and Tobique First Nations)
- Atikamekw Nation Council
- Canim Lake Band
- Carcross/Tagish First Nation
- Carrier Sekani Tribal Council
- Champagne and Aishihik First Nations
- Chawathil First Nation
- Cheam Indian Band
- Cheslatta Carrier Nation
- Council of Yukon First Nations
- Cowichan Tribes First Nation
- Da'naxda'xw First Nation
- Dehcho First Nations
- Dene Nation
- Douglas (Xa'xtsa) First Nation
- First Nation of Na-Cho Nyak Dun
- Elsipogtog First Nation
- Gitga'at First Nation
- Gitxaala Nation
- Gitxsan Hereditary Chiefs
- Haisla Nation
- Heiltsuk Nation
- High Bar First Nation
- Hul'qumi'num Treaty Group
- Huronne-Wendat Nation
- In-SHUCK-ch Nation
- Iskut First Nation
- Kanaka Bar Indian Band
- Kaska Dena Council
- K'atlodeeche First Nation
- Katzie Indian Band
- Kitasoo/Xaixais Nation
- Kitselas Indian Band
- Kitsumkalum First Nation
- Kluane First Nation
- K'omoks First Nation
- Ktunaxa Nation Council
- Kwakiutl First Nation
- Kwanlin Dün First Nation
- Kwilmu'kw Maw-Klusuaqn (Nova Scotia Mi'kmaq)
- Labrador Innu Nation
- Lake Babine Nation
- Lake Cowichan First Nation
- Lheidli T'enneh Band
- Lhoosk'uz Dene Nation
- Little Salmon/Carmacks First Nation
- Lower Nicola Indian Band
- Lyackson First Nation
- Maliseet of Viger
- Manitoba Denesuline (Sayisi Dene First Nation and Northlands Dene First Nation)
- Manitoba Métis Federation
- Métis Nation of Ontario
- Mi'kmaq Confederacy of Prince Edward Island
- Mount Currie (Lil'wat) Nation
- Musqueam Indian Band
- Nak'azdli Band
- Nanoose First Nation
- Nazko First Nation
- Neskonlith Indian Band
- Nisga'a Nation/Nisga'a Lisims Government
- Northwest Territory Métis Nation
- Nuchatlaht First Nations
- Nunatsiavut Government
- Nuu-chah-nulth Tribal Council
- Okanagan Indian Band
- Penelakut Tribe
- Quebec Innu (Pessamit, Matimekush–Lac-John, Innu Takuaikan Uashat mak Mani-Utenam, Ekuanitshit, Unamen Shipu, and Pakua Shipi First Nations)
- Regroupement Petapan (Mashteuiatsh, Essipit, and Nutashkuan First Nations)
- Seabird Island Band
- Selkirk First Nation
- Sipekne'katik First Nation
- Sliammon First Nation
- Snuneymuxw First Nation
- Songhees First Nation
- St. Mary's First Nation (New Brunswick)
- Stellat'en First Nation
- Sto:lo Xwexwilmexw Treaty Association
- Sumas First Nation
- Ta'an Kwäch'än Council
- Tahltan Indian Band
- Takla Lake First Nation
- Taku River Tlingit First Nation
- Te'mexw Treaty Association
- Teslin Tlingit Council
- Tl'azt'en Nation
- Tr'ondëk Hwëch'in
- Tsawout First Nation
- Tsawwassen First Nation
- Tseshaht First Nation
- Tsilhqot'in National Government
- Tsimshian First Nations Treaty Society
- Ts'kw'aylaxw First Nation
- Upper Nicola Indian Band
- Vuntut Gwitchin First Nation
- We Wai Kai Nation (Cape Mudge)
- Wet'suwet'en, Office of the Hereditary Chiefs
- Wet'suwet'en First Nation
- Williams Lake Indian Band
- Yekooche First Nation

ABORIGINAL ORGANIZATIONS

- Assembly of First Nations
- Assembly of First Nations for Québec and Labrador
- British Columbia Assembly of First Nations
- BC First Nations Energy and Mining Council
- First Nations Chief Negotiators (BC)
- First Nations Summit
- First Nations Tax Commission
- Land Claims Agreements Coalition
- Maritime Aboriginal Peoples Council
- Métis National Council
- Union of BC Indian Chiefs

ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

- Treaties and Aboriginal Government
- Atlantic Regional Office
- Quebec Regional Office
- Northwest Territories Regional Office
- Yukon Regional Office

OTHER FEDERAL GOVERNMENT DEPARTMENTS AND AGENCIES

- Canadian Environmental Assessment Agency
- Canadian Heritage
- Canadian Wildlife Service
- Environment Canada
- Federal Steering Committee on Self- Government and Comprehensive Claims
- Finance Canada
- Fisheries and Oceans Canada
- Foreign Affairs, Trade and Development Canada
- Justice Canada
- Major Projects Management Office — Deputy Ministers' Committee
- National Defence and the Canadian Armed Forces
- Natural Resources Canada
- Privy Council Office
- Transport Canada

PROVINCIAL AND TERRITORIAL GOVERNMENTS

- British Columbia
- New Brunswick
- Newfoundland and Labrador
- Northwest Territories
- Nova Scotia
- Ontario
- Quebec
- Yukon

OTHER STAKEHOLDERS AND INTERESTED PARTIES

- BC Association of Police Chiefs
- British Columbia Expropriation Association
- British Columbia Treaty Commission
- Canadian Association of Petroleum Producers
- Canadian Chamber of Commerce
- Canadian Energy Pipeline Association
- Coalition on UN Declaration on the Rights of Indigenous Peoples
- Council of Forest Industries
- Environmental Managers Association of British Columbia
- Fraser Basin Council
- Metro Vancouver
- Mining Association of British Columbia
- Pacific Salmon Foundation
- Pembina Pipeline Corp.
- Rio Tinto Alcan
- Union of BC Municipalities

Appendix B — List of Comprehensive Claims Negotiation Tables Across Canada

14 COMPREHENSIVE LAND CLAIMS NEGOTIATIONS OUTSIDE OF BRITISH COLUMBIA:

EXPLORATORY OR FRAMEWORK NEGOTIATIONS (3)

- Maliseet of Viger (Quebec) (exploratory discussions)
- Mi'kmaq of Prince Edward Island (exploratory discussions)
- K'atlodeeche First Nation (Northwest Territories) (exploratory discussions)

AIP NEGOTIATIONS (6)

- Mi'kmaq and Maliseet of New Brunswick
- Atikamekw Nation Council (Quebec)
- Mi'gmaq of Quebec
- Mi'kmaq of Nova Scotia
- Akaitcho Treaty 8 Tribal Corporation (Northwest Territories)
- Dehcho First Nations (Northwest Territories)

AIPS WAITING FOR CANADA'S APPROVAL (2)

- Algonquins of Ontario
- Northwest Territory Métis Nation

FINAL AGREEMENT NEGOTIATIONS (3)

- Labrador Innu Nation (Newfoundland and Labrador)
- Regroupement Petapan (Quebec)
- Acho Dene Koe First Nation (Northwest Territories)

8 TRANSBOUNDARY NEGOTIATION TABLES:

- Acho Dene Koe First Nation
- Athabasca Denesuline Negotiations North of 60°
  (Black Lake Denesuline First Nation, Fond Du Lac Denesuline First Nation, Hatchet Lake Denesuline Nation)
- First Nation of Na-Cho Nyak Dun
- Inuit Transboundary Negotiations
- Liard First Nation
- Manitoba Denesuline Negotiations North of 60°
  (Sayisi Dene First Nation and Northlands Dene First Nation)
- Northern Region Negotiations (Carcross/Tagish First Nation, Champagne and Aishihik First Nations, Teslin Tlingit Council)
- Ross River Dena Council

53 NEGOTIATION TABLES IN THE BRITISH COLUMBIA TREATY PROCESS:

EXPLORATORY OR FRAMEWORK NEGOTIATIONS (1)

- Wei Wai Kum-Kwiakah Treaty Society

AIP NEGOTIATIONS (27)

- Allied Tribes of Lax Kw'alaams
- Da'naxda'xw Awaetlatla Nation
- Ditidaht/ Pacheedaht First Nations
- Esk'etemc First Nation
- Gitanyow Hereditary Chiefs
- Gitxsan Hereditary Chiefs
- Gwa'Sala-'Nakwaxda'xw Nation
- Kaska Dena Council
- Hul'qumi'num Treaty Group
- Katzie First Nation
- Klahoose First Nation
- Ktunaxa Kinbasket Treaty Council
- Laich-Kwil-Tach Treaty Society
- Lake Babine Nation
- Metlakatla First Nation
- Namgis First Nation
- Nazko First Nation
- Northern Shuswap Tribal Council
- Sto:lo Xwexwilmexw Treaty Association
- Taku River Tlingit First Nation
- Tla-o-qui-aht First Nation
- Tlatlasikwala First Nation
- Tlowitsis First Nation
- Tsleil-Waututh Nation
- Tsay Keh Dene Band
- Wetsuwet'en, Office of the Hereditary Chiefs
- Xwemalhkwu Indian Band

AIPS WAITING FOR CANADA'S APPROVAL (4)

- Wuikinuxv Nation
- Kitselas Indian Band
- Kitsumkalum First Nation
- Te'mexw Treaty Association

FINAL AGREEMENT NEGOTIATIONS (4)

- In-SHUCK-ch Nation
- K'omoks First Nation
- Lheidli T'enneh Band
- Yekooche First Nation

NOT ACTIVELY NEGOTIATING* (17)

- Carrier Sekani Tribal Council
- Cheslatta Carrier Nation
- Council of the Haida Nation
- Gitga'at First Nation
- Haisla Nation
- Heiltsuk Nation
- Hupacasath First Nation
- Kitasoo/Xaisxais First Nation
- Kwakiutl Nation
- Musqueam Nation
- McLeod Lake Indian Band
- Nuu-chah-nulth Tribal Council
- Quatsino First Nation
- Sechelt Indian Band
- Snuneymuxw First Nation
- Squamish Nation
- Westbank First Nation

* *This category includes those groups the Commission has assessed as having no significant tripartite activity in the last fiscal year or longer or are groups taking a pause from negotiations under the BC treaty process or pursuing other arrangements with Canada*

Appendix C — Consolidated List of Recommendations

1. Canada's new reconciliation framework should include a renewed and reformed comprehensive land claims policy along with a wider spectrum of policies and initiatives to reconcile constitutionally protected Aboriginal and treaty rights.

2. The new reconciliation framework should reflect the historic, cultural, and regional diversity among Aboriginal communities to effectively address Aboriginal and treaty rights.

3. A "whole of government" commitment is required, with high level direction and oversight, to implement the new reconciliation framework.

4. Canada should continue to negotiate comprehensive land claims but barriers and inefficiencies in the treaty negotiation process need to be addressed so agreements can be concluded in a timely manner.

5. Canada should identify the spectrum of reconciliation arrangements, apart from modern treaties, it is willing to pursue with Aboriginal groups, and it should be receptive to proposals from Aboriginal groups and provincial or territorial governments.

6. Canada should initiate discussions about potential reconciliation arrangements on a bilateral or tripartite basis in areas of strategic federal interest.

7. Federal mandating and approval processes for reconciliation arrangements should be structured to facilitate timely decision making.

8. Canada should continue its discussions with the Tsilhqot'in National Government about a range of bilateral or tripartite agreements outside the BC treaty process.

9. Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests.

10. Canada should establish a framework for negotiations with the Manitoba Métis Federation to respond to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, 2013 SCC 14.

11. Canada should develop an alternative approach for modern treaty negotiations, one informed by the recognition of existing Aboriginal rights, including title, in areas where Aboriginal title can be conclusively demonstrated.

12. The Minister of Aboriginal Affairs and Northern Development should be given the discretion to approve all non-binding framework agreements and agreements-in-principle upon the recommendation of the federal steering committee.

13. Canada should focus resources on productive negotiating tables, acknowledge where it is unable to make progress with other groups, and identify groups whose interests would be better suited to other reconciliation arrangements.

14. In order to be more responsive, Canada should:

    a. impose internal timelines to obtain necessary approvals and respond to proposals from negotiating tables;

    b. require federal departments to coordinate their resources in ways that address the needs of productive negotiating tables; and

    c. ensure the new reconciliation framework is made a priority across departments.

15. Canada should consider options to accelerate the conclusion of modern treaties, including opt-in legislative approaches, the negotiation of regional umbrella agreements, the identification of mandatory treaty provisions, and the development of "thin treaties".

16. Canada should work with its negotiation partners to develop the necessary accountability mechanisms to be able to assess progress in negotiations.

17. Canada should promote greater accountability through a range of options which may include auditor general reviews, standing committee reports, or annual reports by the Minister of Aboriginal Affairs and Northern Development to Parliament on the status of negotiations at tables.

18. Canada should consider the use of an independent chair to impose accountability and supervise progress at final agreement tables.

19. Canada should encourage its partners to jointly undertake education and information programs about the object and purpose of modern treaties and progress at specific treaty tables.

20. Canada should establish a forum with provincial and territorial governments to share information and best practices and to facilitate coordination for reconciliation initiatives.

21. Canada, the First Nations Summit, and the government of British Columbia should consider changes to the mandate of the British Columbia Treaty Commission to enable the Commission to more effectively assess and facilitate progress in treaty negotiations and, where the conclusion of a treaty is unlikely, assist the parties in exploring other arrangements to advance reconciliation.

22. Negotiation support funding should be tied to progress achieved in negotiations taking into account annual work plans developed and agreed to by the parties.

23. Canada should assume responsibility for the provision of negotiating funding in the BC treaty process if it is unable to resolve its current funding impasse.

24. Canada should develop, with the First Nations Summit and the government of British Columbia, entry criteria for new claims in the BC treaty process.

25. Canada should standardize its funding approaches across the country and develop consistent and transparent negotiation cost guidelines and an appropriate accountability framework.

26. The provision of funding should be linked to negotiation activity and progress. This will require jointly developed multi-year work plans that establish clear and measurable milestones and the development of a tariff prescribing the indemnification for specific steps in the negotiation process.

27. Canada, in conjunction with provincial and territorial governments and Aboriginal groups, should establish a roster of retired judges and dispute resolution specialists to address disputes about territorial boundaries.

28. Canada should support dispute resolution models that incorporate both common law and indigenous legal principles.

29. Canada should encourage Aboriginal groups to use various dispute resolution models to resolve shared territory and overlap disputes, including the Federal Court of Canada's dispute resolution services.

30. Canada, in collaboration with provinces and territories, should develop criteria for the provision of funding for the resolution of shared territories and overlapping claims.

31. Canada should encourage Aboriginal groups to be innovative in their resolution of overlap disputes and should be prepared to implement reasonable resolutions, even where those resolutions may not be consistent with existing treaty mandates.

32. Canada should support and encourage initiatives that address common areas of interest between Aboriginal groups.

33. Canada should encourage the First Nations Leadership Council in British Columbia, and regional Aboriginal organizations elsewhere in the country, to pursue aggregations of rights-holding collectives.

34. Canada should retain a retired judge to review Canada's certainty techniques, and explain the implications of these provisions, at treaty tables where there is apprehension or confusion about the proposed certainty provisions.

35. Canada should encourage Aboriginal groups to meet with representatives from the modern treaty communities to discuss their views about certainty and modern treaty implementation.

36. The scope of the periodic review process for modern treaties should be expanded to consider the potential for amendments to address:

    a. newly identified Aboriginal rights;

    b. the impact of unforeseen circumstances; and

    c. the failure to achieve the objectives of improving socio-economic conditions and facilitating economic development.

37. Canada should support the inclusion of an orderly process approach for all modern treaties.

38. Canada should increase awareness, oversight, and accountability across departments about modern treaty obligations and improve internal structures for co-ordinating and fulfilling implementation activities.

39. Canada should centralize responsibility for the coordination and oversight of the implementation of modern treaties in a central agency.

40. Canada should continue to collaborate with the Land Claims Agreements Coalition to advance the parties' shared objectives.

41. Canada should ensure treaty provisions are interpreted and given effect in the manner intended by negotiators.

42. Canada should develop a training program for federal officials whose responsibilities involve treaty implementation.

43. Canada should, through the central agency responsible for the coordination and oversight of treaty implementation, file an annual report in Parliament about treaty implementation activities.